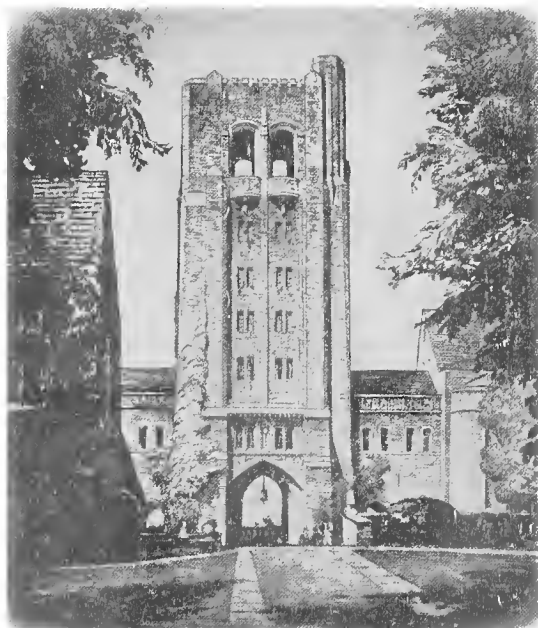




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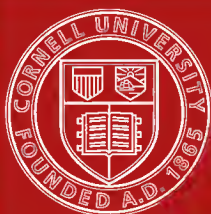
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**A brief on the modes of proving the fact**



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# A BRIEF

ON

## The Modes of Proving the Facts

MOST FREQUENTLY IN ISSUE

OR

COLLATERALLY IN QUESTION

ON

## The Trial of Civil or Criminal Cases.

---

BY AUSTIN ABBOTT

Of the New York Bar.

---

To get in our legal evidence and to keep out illegal evidence of the adversary, is the great art of trying causes; and the policy of counsel is to choose among various modes of proof, that evidence which is competent, either of right or in the discretion of the judge, prudent in the face of the adversary, and likely to be not only effective now, but safe in case of appeal.

---

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## PREFACE.

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Every practitioner knows the aid afforded on a trial by the little brief of a few selected authorities he may have made in preparation for getting in his own evidence and keeping out that of his adversary.

A number of such briefs that have stood the test of experience I have here consolidated into one systematic whole, which I have enlarged so as to include all the topics most commonly contested, and have condensed by pruning away whatever was peculiar to a particular action, or not likely to be both useful and safe in general practice.

It is a familiar elementary principle that the rules of evidence are the same in Civil and Criminal cases, so far as concerns the *mode* of proof. It is when we come to the effect of evidence that the distinction appears. This work, therefore, is adapted to use both in civil and criminal cases. Those questions of evidence which are peculiar to criminal cases, such as the Testimony of the Accused and of Accomplices, Confessions, Consciousness of Guilt, and the like, I have treated in the Criminal Trial Brief; and none of that matter is repeated here, but only referred to in its appropriate place. So the rules which are peculiar to Civil Jury trials, such as the Pleadings Considered as Evidence, etc., are rarely repeated here.

I assume that the reader is familiar with the general principles of the Law of Evidence, and with the appropriate sphere of rules applicable to but a single class of cases; and that when he takes up this volume he is concerned with the rules either of admission or exclusion, which aid him in dealing with a particular fact or class of facts not peculiar to a particular action. In support of such rules, civil and criminal cases are alike instructive authority, and both are accordingly cited.

A word of explanation of the arrangement of the work and its relation to the two other Brief books may facilitate its use.

For convenience of ready reference the order of subjects is strictly alphabetical. It is an Alphabet of Evidence. But to find what he wishes the reader should not search for the general rules of evidence, such as Documentary Evidence, Hearsay, etc., but should ask himself what is the object of his proof; what fact does he wish to get in or keep out. For instance, if he wishes to know whether Hearsay and Opinion are competent for the purpose of proving the age or the health of a person, he should look not for Opinion or Hearsay, but for Age or Health. The arrangement is that of an Index of the Evidentiary Facts common to various classes of litigation.

In the preparation of the work, and settling on the terms in which I should state the rules I set forth, I have used the aid of an analytic or logical method, and considered the facts in groups according to their nature, such as facts of Consciousness, facts of ordinary Physical Observation, Scientific facts, etc., but for convenience of reference the results are arranged in this indexical order. A few deviations allowed from this arrangement, for obvious reasons, are indicated by cross references.

Several distinct advantages are to be found in the systematic preparation for trial, which is here illustrated. 1. The practitioner, by surveying the several modes of proof, is enabled to select his evidence more judiciously. 2. Having refreshed his memory on the precedents, he stands with much more confidence on his position, and speaks with more persuasiveness, even if, as is usually the case, he refrains from citing authorities; and 3, if the exigency of the argument calls for authority, he has it at hand.

AUSTIN ABBOTT.

71 Broadway, New York, May, 1889.

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# BRIEF

## ON

### The Modes of Proving Facts.

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ABANDONMENT.—[As to abandonment of property, see cases collected in 40 *Am. Dec.*, 464.]

§ 1. Direct Testimony.

§ 2. Declarations and Condition.

§ 1. *Direct Testimony*.—A witness may testify that a contract was abandoned, leaving details to be called out on cross-examination.

Wallis *v.* Randall, 81 *N. Y.*, 164, aff'g 16 *Hun*, 32; *S. P.*, 10 *Wall.* (*U. S.*), 367, 383.

§ 2. *Declarations and Condition*.—The declarations of a wife made immediately before her flight, manifesting her feelings, such as satisfaction,<sup>1</sup> or distress,<sup>2</sup> or made immediately afterward to the persons with whom she took refuge,<sup>3</sup> or to a third person,<sup>4</sup> are admissible as part of the *res gestæ*,<sup>5</sup> on the question of abandonment.

So is evidence of her physical condition.

The same principle applies to all persons.

<sup>1</sup> Jacobs *v.* Whitcomb, 64 *Mass.* (10 *Cush.*), 255. (Opin. by BIGELOW, C. J., in assumpsit against a husband for alleged necessities.)

<sup>2</sup> McGowen *v.* McGowen, 52 *Tex.*, 657 (divorce for abandonment).

<sup>3</sup> Cattison *v.* Cattison, 22 *Pa. St.*, 275 (divorce for desertion). *S. P.*, McGowen *v.* McGowen, 52 *Tex.*, 657.

<sup>4</sup> Hoare *v.* Allen, 3 *Esp.*, 276 (Ld. KENYON. *Crim. Con.* declarations as to cause of leaving).

<sup>5</sup> Park *v.* Hopkins, 2 *Bailey* (*S. C.*), 408.

Conversation between the husband and wife in his house, three days after she first left him, admissible as part of the *res gestæ*. *Remsen v. Hay* (*N. Y. Com. Pl., Gen. T.*), 14 *N. Y. Weekly Dig.*, 443.

See also ABSENCE, DESERTION, SEPARATION AND INTENT.

# ABBREVIATIONS.—[See also AMBIGUITIES.]

- § 3. Judicial notice.
- 4. General usage.
- 5. Usage of writer.

- § 6. Pleading.
- 7. Question to witness.

§ 3. *Judicial notice*.—The court may,<sup>1</sup> but is not bound to,<sup>2</sup> take judicial notice of the meaning, according to general usage, of abbreviations in common use.

<sup>1</sup> *Brown v. Piper*, 91 *U. S.*, 37, 42 (*dictum* that it will notice the customary abbreviations of Christian names).

*United States Express Co. v. Keefer*, 59 *Ind.*, 263 (letters "C. O. D."). Approved in *Wasson v. First Nat. Bank*, 107 *Ind.*, 206; s. c., 8 *Northeast. Rep.*, 97.

*Compare Collender v. Dinsmore*, 55 *N. Y.*, 200, 205; s. c., 14 *Am. R.*, 124, where it was intimated that evidence as to "C. O. D." would be necessary; but undoubtedly all courts would now take notice of that term.

*Jordan Ditching, etc., Asso. v. Wagoner*, 33 *Ind.*, 50.

*Frazer v. State*, 106 *Ind.*, 471; s. c., 7 *Northeast. Rep.*, 203 (S. E.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$  sec. 16, T. 21, etc., etc.). Approved in *Wasson v. First Nat. Bk.* (*above cited*).

<sup>2</sup> On the danger of relying on the court taking notice in a doubtful case beyond the knowledge of the judge, though the power exist, see note in 2 *Abb. N. C.* 230.

*So in Hulbert v. Carver*, 37 *Barb. (N. Y.)*, 62, *INGRAHAM, J.*, said, "We can easily guess what was intended by the letters 'Ills. cy.,' but that is not the mode which the law adopts to ascertain the meaning of doubtful terms. It was the duty of the party relying on these terms, as affecting the contract of deposit, to show by parol what was intended."

§ 4. *Evidence of general usage*.—Abbreviations may be explained by oral evidence of usage.

*Abb. Tr. Ev.*, 132, etc., 304, etc., 565.

*U. S. v. Hardyman*, 13 *Pet. (U. S.)*, 176; s. c., 10 *Law. ed.*, 113 (meaning of letter M. in Treasury note "bearing interest at M. per centum").

*Barton v. Anderson*, 104 *Ind.*, 573; s. c., 2 *Western Rep.*, 679 (abbreviations in a written description in a tax deed).

*Jaqua v. Witham, etc., Co.*, 106 *Ind.*, 545; s. c., 4 *Western Rep.*, 715. (That in the trade of dressed lumber, "brac." means "brackets," that "X" means "by," that "mem." stands for "member," that "ply" signifies "thickness," that "brackets" are always quoted and sold as single brackets, and not by the quantity, unless so designated.)

The settled rule is that "where characters, marks or technical terms are used in a particular business, unintelligible to persons unacquainted with such business, and occur in a written instrument, their meaning may be explained by parol evidence, if the explanation is consistent with the terms of the contract." ALLEN, J., in *Collender v. Dinsmore*, 55 *N. Y.* 200, 206; s. c., 14 *Am. Rep.*, 224 [citing *Dana v. Fiedler*, 12 *N. Y.*, 40, the leading case].

The principle extends to extended forms of expression as well as to single words or characters. *Dana v. Fiedler*, 12 *N. Y.*, 40.

§ 5. *Usage peculiar to the writer.*—A usage peculiar to the parties may be proved for this purpose;<sup>1</sup> but in case of a transaction *inter parties* (as distinguished from a will,<sup>2</sup> etc.), the usage of the writer alone is not competent in his favor, without evidence that the other party or person addressed was aware of the usage, or understood the term in the same sense.

<sup>1</sup> See for instance *Barry v. Coombe*, 1 *Pet. (U. S.)*, 640; s. c., 7 *Law. ed.*, 295 (the words "your half E. B. wharf and premises," in a memorandum of a sale of land).

<sup>2</sup> *Abb. Tr. Ex.*, 132, 133.

§ 6. *Pleading.*—The meaning of an abbreviation or other character, in a contract on which the action is directly founded, must be alleged in pleading, in order to let in oral evidence of its meaning.

*United States v. Hardyman*, 13 *Pet. (U. S.)*, 176, 179 (criminal case).

*American Expr. Co. v. Lesem*, 39 *Ill.*, 312, 333 (civil case).

§ 7. *Question to witness.*—A witness of experience in the trade may be asked what is the meaning in that trade of technical phrases and abbreviations used in a document in evidence relating to a transaction in that trade.

<sup>1</sup> *Storey v. Salomon*, 6 *Daly (N. Y.)*, 531, 540. ("Settled at the market, 72½," indorsed on stock straddle. The

judgment was confirmed without questioning this point, in 71 N. Y., 420.)

ABILITY.—[See also CAPACITY, FEELINGS, HEALTH AND DISEASE, INTOXICATION, etc. As to *Financial ability* see INSOLVENCY.]

§ 8. Direct testimony.

9. Experiment.

§ 10. Witness's ability.

§ 8. *Direct testimony*.—A witness who has had continuous opportunity of observation, may, although not an expert, testify directly what ordinary acts a person was able or unable to do.

This is matter of fact, the result of observation, although involving in some measure opinion or judgment.

*Parker v. Boston, etc., Steamboat Co.*, 109 *Mass.*, 449; approved in *Comm. v. Sturtivant*, 117 *Id.*, 134.

*Sloan v. N. Y. Central R. R. Co.*, 45 *N. Y.*, 125.

*S. P., Adams v. People*, 63 *N. Y.*, 621; aff'g 3 *Hun (N. Y.)*, 654 (testimony that one's eyesight was good).

An expert may testify to the degree of physical and mental ability. *Beckwith v. N. Y. Central R. R. Co.*, 64 *Barb. (N. Y.)*, 299. But to testify that A having lost an eye, would not under given circumstances see an object as well as B who had not, it should appear that the expert had examined their eyes. *People v. Marsiler*, 70 *Cal.*, 98.

§ 9. *Experiment*.—On cross-examination, it is in the discretion of the court whether or not to require a party who has testified to a physical inability involved in the issue, to perform an act in the presence of the jury which may manifest its nature and extent.

*Ort v. Fowler*, 31 *Kan.*, 478; s. c., 23 *Am. L. Reg., N. S.*, 569, 577 (not error to require a defendant to read, whose defense to a note was that he signed in reliance on the false representations of its contents by the payee, because he was unable to read it).

*Hatfield v. St. Paul etc. R. Co.*, 33 *Minn.*, 130; s. c., 22 *Northwestern Rep.*, 176 (holding it not error to refuse to require plaintiff to walk after she testified she could not walk without limping).

But compare *Condition*; and Criminal Trial Brief, §§ 567, 591, etc.

§ 10. *Witness's ability*.—It is competent to ask a witness whether he was able to do a specified act,<sup>1</sup> or used the

best ability and skill that he possessed;<sup>2</sup> for his ability is a fact within his own knowledge.

<sup>1</sup> *People v. Tubbs*, 37 *N. Y.*, 586.

<sup>2</sup> *Doyle v. N. Y. Eye & Ear Infirmary*, 80 *N. Y.*, 631, 633. (Question to physician sued for malpractice. But whether the question was leading was not determined).

*S. P., Brink v. Hanover Fire Ins. Co.*, 80 *N. Y.*, 108, 116. (Diligence in serving notice.)

ABSENCE.—[See also ABANDONMENT, DOMICIL, RESIDENCE, DESERTION, and *Criminal Trial Brief*, §§ 428, 429, 521.]

§ 11. Reputation.

12. Fact of letters received.

13. Contents.

14. Telegrams.

15. Entries by deceased.

§ 16. Answers to inquiries.

17. Presumption of continuance.

18. Public officer's absence.

19 and 20. Reasons for absence.

§ 11. *Reputation*.—Absence of a person from the State cannot be proved by general reputation.<sup>1</sup>

But general reputation is competent in corroboration of circumstantial evidence of absence.<sup>2</sup>

<sup>1</sup> *Bank v. Seawell*, 18 *Ala.*, 616. In *Wheeler v. Webster*, 1 *E. D. Smith (N. Y.)*, 1, the court refused to take judicial notice that Daniel Webster was not a resident of New York.

<sup>2</sup> Testimony that witness knew the person, and that he had recently broken up his establishment and was sold out, and thereafter either departed or kept concealed; that previous thereto witness saw him frequently, but since then not at all; and that it is generally understood and believed, etc., etc.—*Held* sufficient to give the magistrate jurisdiction under the statute as to absent and absconding debtors. *Matter of Faulkner*, 4 *Hill (N. Y.)*, 598; *S. P., Van Alstyne v. Erwine*, 11 *N. Y.*, 331.

§ 12. *Fact of letters received*.—Testimony of a witness that he has received letters from a deponent, apparently from places without the State, shortly before the trial, is competent proof of absence.

*Carman v. Kelly*, 5 *Hun (N. Y.)*, 283 (so held for the purpose of excusing his non-production, and to let in his deposition *de bene esse*).

*Gaines v. Relf*, 12 *How. (U. S.)*, 472, 534 (CATRON, J., delivering the opinion of the court, says "the date

of a letter is evidence to prove where the writer was, and the time when he wrote").

The like evidence was received in *Prince v. Blackburn*, 2 *East*, 250, to show absence of subscribing witness.

[For the presumption that letters received in answer are from the person addressed, see LETTERS.]

§ 13. —*contents*.—Letters written during absence from home are admissible in evidence, as explanatory of the nature of the departure and absence, the departure and absence being regarded as one continuous act.

*Rawson v. Haigh*, 2 *Bing.*, 99 ; cited in 22 *Pa. St.*, 277.

§ 14. *Telegrams*.—A telegram received in reply, purporting to be from a person apparently at a distant place, is not competent to show his absence.

*Howley v. Whipple*, 48 *N. H.* 487. The reason is that it is not an original. See note in 14 *Abb. N. C.*, 394.

*Contra*: *Conner v. State*, 23 *Tex. App.*, 378; s. c., 5 *Southwestern Rep.*, 189 (absence of witness, so as to let in deposition).

§ 15. *Entries by deceased person*.—To prove absence of a person since deceased, from a specified place, entries made by him in the course of professional duty, of official acts, the making of which would have required his presence at another place, are competent evidence that he was present at the latter place, at the time stated in such entries.

*Clark v. St. James Church*, 21 *Hun (N. Y.)*, 95.

§ 16. *Answers of third persons to inquiries*.—Answers given to inquiries duly made in search of a person, are not hearsay, but competent as part of the *res gestæ*, to show his absence.<sup>1</sup> Otherwise of hearsay statements, or answers not induced by due inquiry for the purpose.<sup>2</sup>

<sup>1</sup> *People v. Rowland*, 5 *Barb.*, (*N. Y.*), 449 (answers given at residence, and information derived from neighbors, on inquiry for a subscribing witness).

S. P., *Bronner v. Frauenthal*, 37 *N. Y.*, 166, 169, 172 (inquiries at the usual stopping place within the State of a non-resident whose deposition had been taken *de bene esse*).

S. P., *Buswell v. Links*, 8 *Daly (N. Y.)*, 518, 523, and cases cited (answers given at residences to a person calling to serve process).

To similar effect *Chase v. Lawson*, 36 *Hun (N. Y.)*, 221.



S. P., *Van Dyne v. Thayre*, 19 *Wend.* (N. Y.), 162, 165 (holding that the absence of a subscribing witness should be shown by diligent inquiry at his former residence and by information derived from his neighbors).

To similar effect see *Jackson v. Chamberlain*, 8 *Wend.* (N. Y.), 620; *Jackson v. Cody*, 9 *Cow.*, (N. Y.), 240.

*Contra*: *Fry v. Bennett*, 1 *Abb. Pr.* (N. Y.), 289 (holding answers given at the residence to a person inquiring for a witness whose deposition had been taken *de bene esse*, were not competent as a ground for reading his deposition. S. P., 1 *Tay. Ev.*, 523 n.

Compare discussion in *Howard v. Holbrook*, 9 *Bosw.* (N. Y.), 237; s. c. 23 *How. Pr.* (N. Y.), 64 (holding that after being told that the principal was absent, calling again and finding one who answered to the name, and admitted identity, was sufficient evidence of identity to go to the jury).

Whether the rule is applicable in a criminal case to prove an element in the offense, Query—see FICTITIOUS PERSONS, § , and *Criminal Brief*, § 301, 8516.

- 2 *Comm. v. Ricker*, 131 *Mass.*, 581 (holding, on the trial of an indictment, that on the question whether defendant was in the commonwealth at a particular time, the testimony of a sergeant of police that on a certain day a police officer reported to him that he had seen the defendant in the street that night, is incompetent).

§ 17. *Presumption that absence continues.*—The fact of continued non-residence at a previous time having been shown, absence from this State at the present time may be inferred.

*Nixon v. Palmer*, 10 *Barb.* (N. Y.), 175. (Rev'd on other grounds in 8 N. Y., 398.)

S. P., *Rixford v. Miller*, 49 *Vt.*, 319.

§ 18. *Public officer's absence not presumed.*—Absence of one of several officers or other persons clothed with authority of a public nature, cannot be presumed from the mere fact that an official act or report was signed by the others only.

*Yates v. Russell*, 17 *Johns.* (N. Y.), 461, 468 (referee's report sustained by contrary presumption).

*McCoy v. Curtice*, 9 *Wend.* (N. Y.), 17 (warrant for collection of taxes sustained as justification to collector, by contrary presumption).

S. P., *Doolittle v. Doolittle*, 31 *Barb.* (N. Y.), 312.

*Downing v. Rugar*, 21 *Wend.* (N. Y.), 178, 184 (same of

- proceedings of overseers of poor on which warrant was issued).
- Woolsey v. Tompkins, 23 *Wend.* (N. Y.), 324 (same in case of laying out a highway).
- Doughty v. Hope, 3 *Den.* (N. Y.), 249, 594, aff'd in 1 N. Y. (report of commissioners of estimate and assessment). S. P., Miller v. Garlock, 8 *Barb.* (N. Y.), 153.
- Colman v. Shattuck, 2 *Hun* (N. Y.), 497.
- Tucker v. Rankin, 15 *Barb.* (N. Y.), 471.
- People *ex rel.* Kingsland v. Bradley, 64 *Id.*, 228 (official certificate signed by two, aided by the same presumption as to the presence of the third, the fourth being dead and the fifth having vacated the office by removal).
- Smith v. Helmer, 7 *Id.*, 416 (proceedings by commissioners to alter highway).
- Horton v. Garrison, 23 *Id.*, 176 (note given by school trustees).

§ 19. *Reason or motive for absence.*—On the question whether the absence of a person was with fraudulent intent, his declarations made about the time of his departure, or during his absence, and letters written by him during the absence, are competent against him.

- Brady v. Parker, 67 *Ga.*, 636 (declarations just before departure).
- Smith v. Cramer, 1 *Scott*, 541 (letters written a month prior to departure).
- Rouch v. Great Western Ry. Co., 1 *Q. B.*, 51, 61 (letters written during absence).

§ 20. — *competent in his own favor.*—Such declarations and letters may be competent in his own favor.

- United States v. Penn., 13 *N. Bankr. R.*, 641 (holding that where the question in issue was whether the defendant has absconded, his declarations made while on his way from his place of residence as to his intention of returning was competent in his favor).
- Declarations made on return may be received. Bateman v. Bailey, 5 *T. R.*, 512 (a conversation with a bankrupt which passed on his return after nearly two days' absence was received).
- But they must have been made soon after his return. Lees v. Marton, 1 *Mo. & R.*, 210.
- Marsh v. Meager, 1 *Stark.*, 353 (holding that the conversation with the bankrupt not competent if it did not appear to be contemporary with the act or immediately subsequent).

ABSTRACTS.—[See also ACCOUNTS, INDEBTEDNESS and NEGATIVE.]

§ 21. *Voluminous documents*.—If the original documents are inconveniently voluminous or numerous, and the result to be gathered from them is the material fact, a qualified witness who has examined them, may testify to the result subject to cross-examination on details; and an abstract or summary, made by him out of court with the originals before him, and which he testifies is correct, may be received in evidence instead of requiring the originals.<sup>1</sup>

But this is discretionary with the court.<sup>2</sup>

Burton v. Driggs, 20 *Wall. (U. S.)*, 1, 25.

Natl. Ulster Co. Bk. v. Madden, 41 *Hun (N. Y.)*, 113;

LONDON, J., says: "A true copy differs from a true abstract, only in degree."

Hollingsworth v. State, 111 *Ind.*, 289; s. c., 9 *Western Rep.*, 803; 12 *Northeast. Rep.*, 490 (holding the rule equally applicable in criminal cases).

In Boston & W. R. R. Corp. v. Dana, 67 *Mass. (1 Gray)*, 83, 104, BIGELOW, J., says: "It should only be done where books and documents are multifarious and voluminous and of a character to render it difficult for the jury to comprehend material facts without the aid of such statements, and even in such cases they should not be admitted, unless verified by persons who have prepared them from the originals in proof, and who testify to their accuracy, and after ample time has been given to the adverse party to examine them and test their correctness."

<sup>2</sup>Von Sachs v. Kretz, 72 *N. Y.*, 548; aff'g 10 *Hun*, 95; (holding it not error to refuse to allow a witness with the books before him to give a summary where it did not appear that expert testimony was necessary).

ACCEPTANCE.—[And see DELIVERY and DEDICATION. As to acceptance of offer by letter or telegram, see *Abb. Tr. Ev.*, 289, and analysis of recent English Cases in 27 *Alb. L. J.*, 245. Acceptance of goods sold, *Abb. Tr. Ev.*, 318.]

§ 22. Possession.

23. — of deed.

24. — in case of infancy.

§ 25. — *res gestæ* of receiving

26. — direct question.

§ 22. *Possession*.—Acceptance of a written instrument is presumed when the execution is proved, and the instru-

ment is produced from the possession of the party claiming to have received delivery.

*Abb. Tr. Ev.*, 6.

As to when registry of a deed imposing a burden is evidence of acceptance of it by the grantee, compare 9 *Abb. N. C.*, 365 and 371, and *Gifford v. Corrigan*, 105 *N. Y.*, 223; aff'g *Gifford v. McCloskey*, 38 *Hun (N. Y.)*, 350.

§ 23. — *of deed*.—Acceptance of a bond, deed or other beneficial instrument is presumed from delivery to and retention by the grantee.

*Bank of U. S. v. Dandridge*, 12 *Wheat. (U. S.)*, 64 (bond).

*Graves v. Lebanon Nat. Bank*, 10 *Bush. (Ky.)*, 23; s. c. 19 *Am. Rep.*, 50, and cas. cit.

*Van Buskirk v. Warren*, 4 *Abb. Ct. App. Dec. (N. Y.)*, 457; aff'g 34 *Barb. (N. Y.)*, 457; s. c., 13 *Abb. Pr. (N. Y.)*, 145 (assignment).

§ 24. — *in case of infancy*.—An infant's acceptance of a grant is presumed from the beneficial nature of the grant, if it is wholly beneficial and imposes no burden.

*Francis v. N. Y. & Brooklyn Elev. R. R. Co.*, 17 *Abb. N. C.*, 1, 6, and cas. cit.

*S. P., Fellows v. Wood (Q. B. D.)*, 59, *L. T. R., N. S.*, 513.

§ 25. — *res gestæ of receiving*.—On the question whether one mentioned in an instrument as a party, and to whom it was delivered, accepted it, it is competent to ask what he did with it, and what he said about accepting or signing.

*Stevens v. Miles*, 142 *Mass.*, 571; s. c., 7 *Eastern Rep.*, 646 (holding it error to exclude such questions).

§ 26. — *direct question*.—On the question whether goods delivered were accepted by the agent of a party, the agent cannot be asked whether he ever accepted them; for this calls for a conclusion or opinion; but the question should call for what was done or said or left undone or unsaid.

*Brewer v. Housatonic R. R. Co.*, 107 *Mass.*, 277; *Compare* § 27, n. 1.

ACCIDENT.—[See also CARE and INTENT.]

§ 27. *Direct testimony*.—A witness cannot be asked

whether an accident caused by another than himself was accidental, or done on purpose.

*State v. Ross*, 32 *La. Ann.*, 854; *S. P.*, *Stone v. Denny*, 45 *Mass.* (4 *Metc.*), 151.

ACCORD AND SATISFACTION.—[*How proved.*—*Abb. Tr. Ev.*, 814.]

§ 28. *To avoid* the presumption of accord and satisfaction, arising from the acceptance of money for claims for damages, the party may prove that the particular claim now in question was unknown to him and could not reasonably have been learned by him at the time of receiving the payment.

*Scully v. Delameter*, 28 *Fed. Rep.*, 114, and *cas. cit.*

ACCOUNTS —[See also ABSTRACTS, ACCOUNT STATED, CREDIT, AUDIT, EMBEZZLEMENT, FORGOTTEN FACT, HAND-WRITING, NEGATIVE.]

I. FORM AND RELEVANCY.

§ 29. Marks.

30. Loose slips.

31. Photographs.

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II. PROVING AGAINST ONE INTERESTED IN KEEPING.

33. Authentication.

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48. Time of entries.

49. Explaining.

50. — by expert.

51. Discrediting by opinion.

52. — by specific errors.

I.—FORM AND RELEVANCY.

§ 29. *Marks.*—An account is not incompetent merely because kept only by marks.

*Miller v. Shay*, 145 *Mass.*, 162; *s. c.*, 5 *New England Rep.*, 158; 13 *Northeastern Rep.*, 468.

§ 30. *Loose slips.*—Entries made in the regular course of business, according to the practice of the book-keeper, may

(*it seems*) be regarded like entries in the books for the purpose of receiving them (in connection with his oath), in his own favor, as part of the *res gestæ*.

*In re Tully*, 20 *Fed. Rep.*, 812, 815. (*Dictum*, in discussing whether falsifying such slips is forgery; citing cases.)

[*Compare Barber's Adm'r v. Bennett*, 58 *Vt.*, 476; s. c., 2 *New Eng. Rep.*, 215, holding a loose slip not admissible even after the party's death.]

§ 31. *Photographs*.—Photographic copies of accounts and other papers which, by reason of being public records, cannot be removed for production in court, may be received.<sup>1</sup>

Otherwise of originals the genuineness of which is disputed.<sup>2</sup>

<sup>1</sup> *Leathers v. Salvor Wrecking Co.*, 2 *Woods* (*U. S. Circ. Ct.*), 680. BRADLEY, J.

<sup>2</sup> 1 *Central L. J.*, 121.

§ 32. *Relevancy not apparent*.—An account should not be excluded because the matter in question is not apparent on its face, if offered with a promise to give further evidence, which will make it apparent.

*United States v. Stone*, 106 *U. S.*, 525; s. c., 27 *Law. ed.* 163.

## II.—PROVING AGAINST ONE INTERESTED IN KEEPING.

§ 33. *Authentication*.—To render an entry in an account book competent against the party whose book it is, it is enough to show that the entry is in his handwriting, or that it is in the handwriting of some servant or agent of his, or even that it appears on the face of the account that it is one of a series of entries continuing for such a length of time as to justify an inference that the writer was a recognized servant or agent.<sup>2</sup>

<sup>1</sup> *Nichols v. Alsop*, 10 *Conn.*, 263. (So holding of an unsigned account rendered.)

<sup>2</sup> *Root v. Great Western Ry. Co.*, 1 *N. Y. Supm. Ct. (T. & C.)*, 10; s. c., 65 *Barb. (N. Y.)*, 619. (Entries in book kept by a railway company. Aff'd in 55 *N. Y.*, 638, apparently without discussing this point. The length of time seems a question for the jury.)

§ 34. *Agents' books.*—Entries in the books of a party's agent are competent against the party.

Standard Oil Co. v. Triumph Ins. Co., 64 N. Y., 85, 91; aff'g 3 Hun (N. Y.), 591; s. c., more fully, 6 N. Y. Supm. Ct. (T. & C.), 300.

§ 35. *Joint books.*—Entries in books of a firm<sup>1</sup> or association<sup>2</sup> are competent against a member, even in favor of another member or of the whole body, if it be shown that the one against whom they are offered had access to the books and opportunity to know of the entries. Evidence that he had no actual knowledge goes to their weight, not their competency.

<sup>1</sup> Fairchild v. Fairchild, 64 N. Y., 471; aff'g 5 Hun (N. Y.), 407 (firm books, evidence between the partners).

<sup>2</sup> See KNOWLEDGE.

### III.—PROVING IN FAVOR OF ONE INTERESTED IN KEEPING.

§ 36. *Bringing home to adverse party.*—Testimony of the party producing his account in his own favor, that he thinks the other party saw the entry is not enough to make it evidence against the latter.

Manion Blacksmith, etc., Co. v. Carreras, 19 Mo. App., 162; s. c., 1 Western Rep., 414 (judgment reversed because founded on this evidence. THOMPSON, J.)

§ 37. *Shop books: rule in Vosburg v. Thayer.*—Necessary evidence to render shop books evidence in favor of the party keeping them, to prove goods sold, services, etc.

See Abb. Tr. Ev., 322, and cas. cit.; and McGoldrick v. Traphagen, 88 N. Y., 334, extending the rule, and Beatty v. Clark, 44 Hun (N. Y.), 126, applying restrictions.

§ 38. *Entry by person since deceased.*—An entry made by a party in his own books is not made competent in his favor by the fact that he is since deceased.

Mason v. Wedderspoon, 43 Hun (N. Y.), 20, and cas. cit.

§ 39. *Bank books*—Entries in account books of a bank are made competent evidence against a depositor, customer or officer,<sup>1</sup> by producing the clerk who made the entries, he

testifying to the transactions,<sup>2</sup> or testifying that it was his uniform custom to make entries at the time of the transaction, and that he has no doubt the entry now offered was truly made;<sup>3</sup> or by proving the handwriting of the clerk who made the entries, and that he is dead<sup>4</sup> or insane.<sup>5</sup>

Without such evidence they are not competent,<sup>6</sup> (unless the party against whom they are adduced is a stockholder or officer). It is error to receive them upon testimony of other officers or clerks of the bank, who have not personal knowledge of the transactions.<sup>7</sup>

<sup>1</sup> *Humphrey v. People*, 18 *Hun* (N. Y.), 393 (to prove embezzlement). See also, 26 *Moak Eng.*, 152, note, citing other cases.

<sup>2</sup> *Burke v. Wolfe*, 38 *N. Y. Super. Ct. (J. & S.)*, 263, 268.

<sup>3</sup> *Bank of Monroe v. Culver*, 2 *Hill* (N. Y.), 531, 535.

<sup>4</sup> *Ocean Nat'l Bank v. Carll*, 9 *Hun* (N. Y.), 239.

<sup>5</sup> *Union Bk. v. Knapp*, 3 *Pick. (Mass.)*, 97.

In some States it is enough to show that the clerk is beyond the jurisdiction. *Otto v. Trump*, 115 *Pa.*, 425; s. c., 7 *Central Rep.*, 629; 8 *Atlantic Rep.*, 786; 19 *W. N. C.*, 296 (*dictum*). *North Bank v. Abbot*, 13 *Pick. (Mass.)*, 465; s. c., 25 *Am. Dec.*, 334.

<sup>6</sup> *White v. Ambler*, 8 *N. Y.*, 170.

<sup>7</sup> *Ocean Nat. Bank v. Carll*, 55 *N. Y.*, 440.

But where the question was whether moneys admitted to have been paid out to one named by the depositor as her agent were chargeable to her; and he had drawn out numerous items, and finally had drawn out the balance and redeposited it in his own name, —*held*, that the bank defendant, upon the examination of its treasurer, could produce the bank ledger and ask him to state what the account therein contained respecting such items and balance, for the purpose of showing the manner in which the account was kept, and the items and dates. *Wilcox v. Onondaga County Savings Bk.*, 40 *Hun* (N. Y.), 297.

#### IV.—MUTUAL ACCOUNTS.

§ 40. *Account rendered*.—An account in the handwriting of one party, produced from the possession of the other party, may be presumed to have been rendered by the former to the latter.



Nichols *v.* Alsop, 10 *Conn.*, 263.

[As to effect see ACCOUNT STATED.]

§ 41. *Pass books.*—Pass books containing debit and credit entries, and proved to have been kept usually in the possession of one party, and delivered from time to time to the other for the purpose of writing up, and to have been written up accordingly and returned, are admissible against either party, irrespective of whether their contents are original entries or not.

Burke *v.* Wolfe, 38 *N. Y. Super. Ct. (J. & S.)*, 263, 267.  
(Opinion by FREEDMAN, J., reviewing cases as to accounts.)

§ 42. *Conclusiveness.*—A bank pass book written up and returned and not objected to becomes conclusive as an account stated.

Leather Manufacturer's Bank *v.* Morgan, 117 *U. S.*, 96 ;  
s. c., 29 *Law. ed.*, 811; 6 *Sup. Ct. Rep.*, 657, and cas.  
cit. [See also ACCOUNT STATED].

#### V.—PROVING ACCOUNT IN AID OF ORAL TESTIMONY.

§ 43. *Contemporaneous entries.*—Entries in an account or other contemporaneous memoranda are made competent by producing a witness who testifies that he gave correct information to the writer, although he did not see the entries; and producing also the writer who testifies that he, at the time, and knowing his informant, correctly entered the information so received.

Mayor *v.* Second Ave. R. R. Co., 102 *N. Y.*, 572; s. c., 3  
*Central Rep.*, 823. (Time book of labor, and delivery  
book of materials )

[See also FORGOTTEN FACT.]

Compare Chaffee *v.* United States, 18 *Wall (U. S.)*, 516;  
s. c., 21 *Law. ed.*, 908.

§ 44. *Written details of facts testified to.*—A witness called to prove a number of items may use an account or list to refresh his memory, being required by the court thereupon to testify to each item separately. Or if without the account he cannot recollect all the items he may in the discretion of the court be allowed to testify to the result and the correctness of the account; and the

account is then admissible as a statement in detail of what he has testified to.

*Singer v. Brockamp*, 33 *Minn.*, 501; s. c., 24 *Northwestern Rep.*, 189.

*McCormack v. Pennsylvania Cent. R. R. Co.*, 49 *N. Y.*, 303; rev'g 3 *Alb. L. J.*, 129.

*Howard v. McDonough*, 77 *N. Y.*, 592; aff'g 8 *Daly* (*N. Y.*), 365.

*Compare Harvey v. Cherry*, 76 *N. Y.*, 436; aff'g 12 *Hun* (*N. Y.*), 354 (where exclusion was sustained).

## VI.—EXPLANATIONS, CORRECTIONS, AND DISCREDITING.

§ 45. *Accounts not exclusively the best evidence.*—Books of original entry, although they are the best evidence of their own contents<sup>1</sup> are not necessarily the best evidence of the facts entered therein; and the party's non-production of his books (unless they have been duly called for), does not preclude him from proving the charges by the testimony of a witness of the admissions of the adverse party.<sup>2</sup>

<sup>1</sup> *Clark v. Dearborn*, 6 *Duer* (*N. Y.*), 309; holding that even to prove down to what date an account was kept with a bank, the books of the bank must be produced, or foundation for secondary evidence laid.

<sup>2</sup> *Rumsey v. N. Y. & New Jersey Telephone Co.*, 49 *N. J. L.*, 322; s. c., 6 *Central Rep.*, 823.

§ 46. *Secondary evidence not rebuttable.*—He who by refusing to produce his accounts when duly called for lets in his adversary's secondary evidence of their contents, cannot contradict that evidence.

*Bogart v. Brown*, 5 *Pick. (Mass.)*, 18.

*Platt v. Platt*, 58 *N. Y.*, 646, 649.

*McGuinness v. School-Dist. No. 10 (Minn., 1888)*, 41 *Northwestern Rep.*, 103; (holding that he cannot afterwards introduce even the book itself for purpose of contradicting the secondary evidence).

*Otherwise* of a public record equally accessible to both. *Tyng v. U. S. Submarine, etc. Co.*, 1 *Hun* (*N. Y.*), 161, approved and affirmed in 60 *N. Y.*, 644; s. c., more fully, 49 *How. Pr. (N. Y.)*, 360.

So he may produce the book to prove another part of the account. *Id.*

And refusal to produce as evidence on a collateral question does not alone establish fraud, nor exclude other evidence of the facts. *Burr v. Am. Spiral Spring Butt Co.*, 8 *Abb. N. C.*, 403; s. c., 81 *N. Y.*, 175.

§ 47. *Interpreting symbols.*—A cross, check or other unintelligible mark on the face of an account may be explained by the writer; and with his testimony to the fact noted by it, it is competent evidence for the jury.

*North Bank v. Abbot*, 13 *Pick. (Mass.)* 465; s. c., 25 *Am. Dec.*, 334.

§ 48. *Time of entries.*—The opinion of a witness is not competent on the question whether entries in an account produced in court were in fact made at the same or different times.<sup>1</sup> Entries made in the ordinary course of duty by a third person not appearing to have had any interest are in the absence of evidence to the contrary presumed by law to have been made at the time they bear date.<sup>2</sup>

<sup>1</sup> *Phoenix Fire Ins. Co. v. Philip*, 13 *Wend. (N. Y.)*, 81 and cas. cit.

*Ellingwood v. Bragg*, 52 *N. H.* 488, 490.

<sup>2</sup> *Jermain v. Denniston*, 6 *N. Y.*, 276; rev'g *Jermain v. Worth*, 5 *Den. (N. Y.)*, 342 (entry by bank officer in dealer's passbook.)

[In other cases if the competency of the entry depends on the date, there must be independent evidence of the date.]

§ 49. *Explaining.*—A party whose accounts have been put in evidence either in his own favor, or against him, may explain them by oral evidence of the intent and meaning of the entries.

*Arnold v. Allen*, 9 *Daly (N. Y.)*, 198.

*Meeker v. Claghorn*, 44 *N. Y.*, 349.

*Foster v. Persch*, 68 *Id.*, 400.

*Champion v. Joslyn*, 44 *N. Y.*, 653. (In an action for the balance of an account, stated by defendant, he may claim an omitted item; but cannot testify as a witness to his reason, not communicated to plaintiff, for omitting it.)

*Harrison v. Kirke*, 38 *N. Y. Super. Ct. (J. & S.)*, 396 (error to refuse to allow the party to testify how commissions were really entered in his account, though not appearing as such).

*Richard v. Wellington*, 66 *N. Y.*, 308; rev'g 5 *Hun (N. Y.)*, 181 (competent to show that a credit in an account rendered, was not an admission relevant to the transaction against which it was credited, but arose in an independent transaction).

*Quincey v. White*, 63 *N. Y.*, 370; rev'g *The same v.*

Young, 5 *Daly* (N. Y.), 327 (competent to prove that one defendant had simultaneously a separate account, as tending to prove that the account in question was joint).

Pierson v. Atlantic Nat. Bk. of N. Y., 77 N. Y., 304. (*Held* that to show that entries apparently charging a cashier were really against his bank, plaintiff might show that similar entries had been made of a former transaction with the bank.)

§ 50. — *by expert*.—A bookkeeper cannot be allowed to explain as an expert, books not shown to have been kept under any technical or scientific system of bookkeeping, and which do not appear to require explanation.

McKay v. Overton, 65 *Tex.*, 82.

§ 51. *Discrediting by opinion*.—The accuracy of an account cannot be impugned by asking a witness what is the party's character in respect to keeping accounts; for this calls for an opinion, instead of specific facts.

Long v. Taylor, 29 *Hun* (N. Y.), 127 (holding it not error to exclude such a question).

S. P., Tomlinson v. Borst, 30 *Barb.* (N. Y.), 42, 46, holding evidence of moral character incompetent; and that only business character [meaning obviously reputation, not the witness' opinion], and business capacity, and mode of keeping books can be shown.

§ 52. — *by specific errors*.—It is not competent for the purpose of discrediting the accuracy of an account to show an error in entries of transactions entirely disconnected with that in question, for this would involve trying a collateral issue.

Burnham v. Town of Strafford, 58 *Vt.*, 194; s. c., 2 *Atlantic Rep.*, 126 (holding that the rule is the same as to official accounts as in respect to private; and the same where the object of putting the account in evidence is to prove a negative from the absence of an entry on the subject, as where the object is to prove a charge entered).

S. P., Gardner v. Way, 8 *Gray* (Mass.), 189.

Compare Read v. Smith, 1 *Hun* (N. Y.), 263; s. c., 3, *N. Y. Supm. Ct. (T. & C.)*, 760. Here plaintiff's account book was admitted to prove loans; and defendant claimed that some of them had been paid—*Held*, that defendant was entitled to call for the preceding and following entries, in themselves irrelevant, to test

the accuracy of the entries, or their contemporaneous character. *S. P., Metropolitan Natl. Bk. v. Hale*, 28 *id.*, 341.

In *Rodenbaugh v. Rosebury*, 24 *N. J. L.*, 491, it was held that excluding evidence of a single incorrectness was not error, for a single error could not impair the credibility of the books.

See also *Teague v. Irwin*, 134 *Mass.*, 303; where, in an action for deceit in the sale of the stock of a corporation, the defendant called the treasurer, who produced his journal or cash book, and testified that he showed it to plaintiff,—*Held*, that plaintiff might cross-examine the witness to show that the books were not fairly kept, and did not correctly show the company's affairs.

### ACCOUNT STATED.—[And see ACCOUNTS.]

- |   |   |
|---|---|
| § 53. Account rendered and not objected to. | § 56. Objections to part.                   |
| 54. Part payment on account rendered.       | 57. Reasonable time.                        |
| 55. Reservation of objection.               | 58. Giving note implies accounting in full. |
|   | 59. To impeach.                             |

§ 53. *Account rendered and not objected to*.—An account rendered and not objected to within a reasonable time is admitted to be *prima facie* correct; but the presumption may be repelled by showing absence from home, illness, or an intention shortly to see the other party.

If not repelled, the account is deemed an account stated.

*Wiggins v. Burkham*, 10 *Wall (U. S.)*, 129; s. c., 19 *Law. ed.*, 884.

*Lockwood v. Thorne*, 18 *N. Y.*, 285.

§ 54. *Part payment on account rendered*.—Making part payment on an account rendered, is enough to go to the jury, as showing an account stated.

*Samson v. Freedman*, 102 *N. Y.*, 699.

§ 55. *Reservation of objection*.—A reservation of the right to correct errors, etc., if any, does not deprive the account stated of effect, but leaves the burden on the party reserving the right, to prove error.

*Samson v. Freedman*, 102 *N. Y.*, 699.

*McKay v. Overton*, 65 *Tex.*, 82.

§ 56. *Objections to part*.—Objections made to specified items only, does not prevent the rest of the account from becoming an account stated as if no objection were made.

Wiggins v. Burkham, 10 *Wall* (U. S.), 129; s. c., 19 *Law. ed.*, 884.

§ 57. *Reasonable time*.—What is a reasonable time to allow for objections is a question of law unless the facts are in doubt.<sup>1</sup> Twelve days between merchants at home, is not too short a time to turn an account rendered and not objected to, into an account stated.<sup>2</sup>

<sup>1</sup> *Standard Oil Co. v. Van Etten*, 107 *U. S.*, 325, and cas. cit. And see REASONABLE TIME.

<sup>2</sup> *Wiggins v. Burkham* (above cited).

§ 58. *Giving note implies accounting in full*.—The giving of a promissory note raises a legal but not conclusive presumption that at its date the parties adjusted all demands between them, and found a balance thereupon due of an amount represented by the note.

*Lake v. Tysen*, 6 *N. Y.*, 461.

*Proctor v. Thomson*, 13 *Abb. N. C.*, 340, 351 and cas. cit. *Abb. Tr. Ev.*, 809.

§ 59. *To impeach* an account stated, the books of account on the faith of which it was made are admissible in evidence, as admissions of the party against his interest, to show the manner in which the settlement was made and an erroneous balance struck.

*Hanson v. Jones*, 20 *Mo. App.*, 596; s. c., 2 *Western Rep.*, 611.

ACKNOWLEDGMENT.—[As to acknowledgment to take a debt out of the statute of limitations, see *Abb. Tr. Ev.*, 824.]

§ 60. What defects disregarded.      § 62. Impeaching.  
61. Pending suit.

§ 60. *What defects disregarded*.—Formal defects or omissions in the certificate may be disregarded if what is contained can be construed as stating in substance all that is required.<sup>1</sup>

Defective acknowledgment by a married woman is not void, except on the objection of herself or those claiming under her.<sup>2</sup>

<sup>1</sup> *Smith v. Boyd*, 101 *N. Y.*, 472.

For other cases see Note in 14 *Abb. N. C.*, 452; and 1 *Abb. New Pr. and Forms*, I., etc.

<sup>2</sup> *Delafield v. Brady*, 38 *Hun* (N. Y.), 404.

[For the formal requisites of acknowledgments and the certificates thereto, see 1 *Abb. New Practice and Forms*, 2-13

§ 61. *Pending suit*.—Acknowledgment competent though made and certified pending suit.

*Abb. Tr. Ev.*, 505.

§ 62. *Impeaching*.—In the case of a deed actually executed by a married woman of full age and sound mind, a certificate of her separate examination and acknowledgment, in the form prescribed by the statute, and duly recorded with the deed, cannot afterwards, except for fraud, be controlled or avoided by extrinsic evidence of the manner in which the examination was conducted by the magistrate.

*Hitz v. Jenks*, 123 *U. S.*, 297, and cas. cit.

*Watson v. Watson*, 118 *Ill.*, 56; s. c., 7 *Northeastern Rep.*, 95 (holding that fraud or collusion on the part of the officer, must be shown).

Compare *Abb. Tr. Ev.*, 175.

ACQUIESCENCE.—[And see ESTOPPEL AND RATIFICATION.]

§ 63. *Burden of proof*.—To bar a party by acquiescence, the burden of proving that his acquiescence was with full knowledge of all the facts and of all existing legal rights, is upon the one who alleges acquiescence.

*Pence v. Langdon*, 99 *U. S.*, 578, 581. (Current suspicion and rumor are not enough.)

*Adair v. Brimmer*, 74 *N. Y.*, 539, 554 (ratification by *cestui que trust*).

See *Lux v. Haggin*, 69 *Cal.*, 255; s. c., 10 *Pacific Rep.*, 674, 686, and cas. cit.

ADDRESS.—[And see ABSENCE, FICTITIOUS PERSON, RESIDENCE, DOMICIL.]

§ 64. Privilege of attorney and client. § 65. City directory.

§ 64. *Privilege of attorney and client*.—The privilege of professional communications precludes the attorney from testifying to the address of his client if communicated to him confidentially for the purpose of professional advice.

Re *Arnott*; Exp. Chief Official Receiver, *Law Times* (London), Dec., 1888.

But the court may require the attorney to disclose the client's address as the condition of obtaining a favor such as the opening of a default, postponing the cause, and the like. 2 *Abb. New. Pr. & F.*, 500.

§ 65. *City directory*.—A city directory is not, without testimony to its correctness, admissible, to prove the place of business of a person named therein.

Langley v. Smith, 3 *N. Y. State Rep.*, 276 (McADAM, J.).

ADMISSIONS AND DECLARATIONS.—[See also ACCOUNT STATED, ACCOUNTS, CONVERSATION. LETTERS, TELEPHONE, MESSAGE.]

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| § 66. Qualification of witness hearing or understanding. | § 74. Plea to indictment.                     |
| 67. — recollection of words.                             | 75. Record of one's society.                  |
| 68. Identifying the speaker.                             | 76. Best and secondary.                       |
| 69. Reference to things not specified.                   | 77. Knowledge.                                |
| 70. Statute requiring writing.                           | 78. Admission pending compromise, privileged. |
| 71. Undelivered writing.                                 | 79. Contradicting.                            |
| 72. Admission in a pleading.                             | 80. Change of opinion.                        |
| 73. — in unauthenticated document, used.                 | 81. Entire statement or conversation.         |
|  | 82. Conduct against admissions.               |

§ 66. *Qualification of witness hearing or understanding*.—To enable a witness to testify to an admission it is not necessary that he should have heard or understood the whole of the conversation.

Denver etc. R.R. Co. v. Neis, 10 *Colo.*, 56; s. c., 14 *Pacific Rep.*, 105. See other authorities in *Crim. Tr. Brief*, 409, § 676. S. P., State v. Carson, 95 *N. C.*, 593. See also CONVERSATION.

§ 67. — *recollection of words*.—It is not necessary that the witness should be able to testify to the exact language; <sup>1</sup> but he must be able to give the substance.<sup>2</sup> He may state the impression on his mind as to the fact of what was said,<sup>3</sup> but not what he understood to be meant by what he testifies was said.<sup>4</sup>

<sup>1</sup> *Ruch v. Rock Island*, 97 *U. S.*, 693 (holding thus of witness now produced to prove the testimony given, on a former trial, by a witness now dead; and the court say that claiming to repeat the precise language is a suspicious circumstance).

Compare cases in *Criminal Trial Brief*, 406, § 671; giving illustrations of vital effect of slight mistakes.



<sup>2</sup> *Dennis v. Chapman*, 19 *Ala.*, 29; s. c., 54 *Am. Dec.*, 186, with note. (*Held* not error to reject the testimony of a witness who did not propose to state the language nor the substance of a party's admissions against interest, but merely to give his understanding of them.)

*Hale v. Silloway*, 83 *Mass.* (1 *Allen*), 21 (the witness cannot state what others understood).

<sup>3</sup> *Whitman v. Morey* (*N. H.* 1886), 5 *Eastern Rep.*, 187, 195 (not error to allow witness who could not recall the language to say that the speaker was favorably inclined to a person named. It was for the trial judge to determine whether this was her impression of the substance of what was said and competent, or the impression the witness drew from what was said and therefore incompetent).

<sup>4</sup> *Hibbard v. Russell*, 16 *N. H.*, 344, 410; 41 *Am. Dec.*, 733. (Here witness testified the party said he was "good for the note," or "had got to pay the note." Not error to exclude testimony that he understood that the party intended to pay it.)

§ 68. *Identifying the speaker.*—The witness must be able to identify the person to whose admission he testifies.

*Whitney v. Brownell*, 71 *Iowa*, 251; s. c., 32 *Northwestern Rep.*, 285 (uncertainty as to which of two defendants made the admission, fatal).

*Arthur v. Arthur*, 38 *Kan.*, 691; s. c., 17 *Pacific Rep.*, 187. (Witness who was a stranger to the party and derived all his information as to identity from the speaker claiming to be such party, cannot testify to his statements as admissions.) But see *IDENTITY*.

§ 69. *Reference to things not specified.*—The witness testifying to a conversation, cannot state his understanding as to what or who was referred to by language which requires explanation, unless he is limited to his understanding from the conversation itself.

*Marcy v. Stone*, 8 *Cush. (Mass.)*, 4; s. c., with note, 54 *Am. Dec.*, 736 (error to allow witness who had stated the whole conversation, to say what he understood was "the land" referred to, the question not being thus limited).

*Cutler v. Carpenter*, 1 *Cow. (N. Y.)*, 81 (witness cannot state belief as to what time the statement in the admission referred to, if there was nothing in the conversation from which he draws the conclusion).

§ 70. *Statute requiring writing.*—An act for the validity of which the law prescribes a writing, it is not competent

to prove, by evidence that the party orally admitted having performed, or having executed such a writing,<sup>1</sup> unless a foundation for secondary evidence is first laid.

<sup>1</sup> *Boynton v. Rees*, 8 *Pick. (Mass.)*, 339; s. c., 19 *Am. Dec.*, 326 (*Dictum*: Statute of frauds).

*Bivins v. McElroy*, 11 *Ark.*, 23; s. c., with note, 52 *Am. Dec.*, 258 (Statute of frauds).

*Fox v. Reil*, 3 *Johns. (N. Y.)*, 477 (absence of subscribing witness to unacknowledged deed not dispensed with by proof that the grantor admitted executing the deed).

S. P., in criminal cases. *Criminal Tr. Brief*, 265, § 445. Compare *Day v. Leal*, 14 *Johns. (N. Y.)*, 404, holding that a receipt acknowledging the execution of a bond and warrant of attorney, is sufficient evidence of their existence as against the signer, without producing them.

§ 71. *Undelivered writing*.—A writing which the writer has never delivered nor shown, is not competent as proving his admission of a fact therein stated, unless it be one of a private nature such as a personal diary.<sup>1</sup>

But if delivered or shown, the instrument is not incompetent as proving an admission because of lacking the authentication necessary to make it effective for the purpose for which it was intended.<sup>2</sup>

<sup>1</sup> *Wilcox v. Wilcox*, 46 *Hun (N. Y.)*, 32 (letter unsent, found among papers of the writer after his death).

*Robinson v. Cushman*, 2 *Den. (N. Y.)*, 149 (undelivered specialty).

So also of an admission contained in a deposition taken in the cause but not put in evidence because the party is in court. *Priest v. Way*, 87 *Mo.*, 16; s. c., 3 *Western Rep.*, 256 (error to allow such admissions to be read).

<sup>2</sup> *Kaufman v. Schoeffel*, 46 *Hun (N. Y.)*, 571.

*Jackson v. Brooks*, 8 *Wend. (N. Y.)*, 426; aff'd in 15 *Id.*, 111, but no opinion reported. (Bond.)

*Morrell v. Cawley*, 17 *Abb. Pr. (N. Y.)*, 76. (Sealed lease executed by agent, and void for want of sealed authority, competent as against the principal to prove value of use and occupation.)

§ 72. *Admission in a pleading, etc.*—An admission contained in a pleading or affidavit verified by the party, is none the less competent against him because expressed to be on information and belief.

Pope v. Allis, 115 U. S., 363, 370; s. c., 29 Law. ed., 393; 6 Sup. Ct. Rep. 69 (pleading).

Chicago & Northw. R. R. Co. v. Ohle, 117 U. S., 123; d. c., 29 Law. ed., 837; 6 Sup. Ct. Rep., 632 (affidavit).

For the mode of putting in evidence the pleading in a civil action, and the necessity of showing privity, see *Brief for Trial of Civil Jury Cases*, 65.

§ 73. —*in unauthenticated document, used.*—A copy of an affidavit which has been used by the party as evidence in the course of the proceedings in the same cause, is competent evidence against him as an admission, irrespective of whether the authentication was sufficient to render it competent as a copy.

Urtetiqui v. D'Larcy, 9 Pet. (U. S.), 692; s. c., 9 Law. ed., 276.

§ 74. *Plea to indictment.*—The plea of *nollo contendere* admits the facts only for the purpose of the pending prosecution; and, if accompanied by a protestation of the defendant's innocence, cannot, like a plea of guilty, be used in a civil suit, as an admission of the facts charged in the indictment.

*Criminal Trial Brief*, §§ 132-134.

Comm. v. Horton, 26 Mass. (9 Pick.), 206.

Comm. v. Tilton, 49 Id. (8 Metc.), 232.

Birchard v. Booth, 4 Wisc., 67.

Buck v. Comm., 42 Leg. Int., 353.

§ 75. *Records of one's society.*—An entry by the secretary in the records of a society of which deceased was a member, stating his age, is not evidence of his declaration of his age, against one claiming under him, unless it be shown that the statement proceeded from the deceased, or that he acquiesced in it; and the fact that he afterward became secretary, and had custody of the book is not enough to show acquiescence.

Connecticut Mut. L. Ins. Co. v. Schwenk, 94 U. S., 593; s. c., 24 Law. ed., 294.

See also KNOWLEDGE. As to whether it may be made evidence by calling the secretary, or by proving that the entry was made in the ordinary course of duty, and accounting for his absence, see § 35, ACCOUNTS.

§ 76. *Best and secondary.*—The contents of a statement which was made in writing cannot be orally proved without

accounting for non-production of the writing as a foundation for the secondary evidence.<sup>1</sup> But the mere fact that a document was present at the conversation may be proved without accounting for its non-production.<sup>2</sup>

<sup>1</sup> *Berrian v. Sanford*, 1 *Hun* (N. Y.), 625 (memorandum by the parties as to the value of property).

*State v. DeWolf*, 8 *Conn.*, 93; s. c., 20 *Am. Dec.*, 90. (Here it was held error to receive testimony of what a deaf mute wrote, where there was no proof of the loss of the paper, except the witness' statement that he did not know where it was.)

[In recent cases the courts have inclined to dispense with strict proof, where the paper is one that in the usual course is destroyed or surrendered as soon as used. And this ought to be the rule with ordinary slips used in conversation with a deaf mute.]

<sup>2</sup> *Tatum v. State*, 82 *Ala.*, 5; s. c., 2 *Southern Rep.*, 531.

§ 77. *Knowledge*.—To render an admission competent against the party who made it, it is not necessary that the facts should have been within his knowledge.

*Chapman v. Chicago etc. R. Co.*, 26 *Wisc.*, 295; S. P.,

§ 77. But repetition of hearsay is not an admission of its truth. *Stevens v. Vroman*, 16 *N. Y.*, 381; rev'g 18 *Barb. (N. Y.)*, 250.

§ 78. *Admission pending compromise, privileged*.—The rule of exclusion applied in civil cases<sup>1</sup> is not applicable in criminal cases.<sup>2</sup>

<sup>1</sup> *Civil Jury Brief*, § 78.

Rule limited in *Brice v. Bauer*, 103 *N. Y.*, 428.

<sup>2</sup> *State v. Soper*, 16 *Me.*, 293; s. c., 33 *Am. Dec.*, 665.

§ 79. *Contradicting*.—The rule that the declarations of a party are provable for purpose of proving their falsity,<sup>1</sup> does not require that his attention be first called to the time and place, etc.<sup>2</sup>

<sup>1</sup> *English v. Steele*, 4 *N. Y. Supm. Ct. (T. & C.)*, 211. (So held even though he had died since his direct examination.)

See *Criminal Trial Brief*, 310, § 534.

<sup>2</sup> *Civil Jury Brief*, 76.

§ 80. *Change of opinion*.—A party whose admission of liability has been proven against him, may testify in his own behalf that on reflection he changed his mind.

*Stowe v. Bishop* (Vt., 1886), 2 *New Engl. Rep.*, 109.

§ 81. *Entire statement or conversation*.—Under the rule that a party whose admissions are proved has a right to have all that was said by the same person in the same conversation in any way qualifying or explaining the part adduced against him, or tending to destroy or modify the use sought to be made of it, but no more;<sup>1</sup> the burden is upon him to show affirmatively the simultaneousness of the qualifying parts he claims to prove.<sup>2</sup>

Rouse *v.* Whited, 25 *N. Y.*, 170; rev'g 25 *Barb.*, (*N. Y.*), 279.

Barnes *v.* Allen, 1 *Abb. Ct. App. Dec.* (*N. Y.*), 111 (holding that although the jury are not necessarily bound to give equal credit to all parts of an admission, it is not proper to instruct them, in effect, that they may arbitrarily believe the fact admitted, and disbelieve the reasons assigned for it).

For other authorities see *Criminal Trial Brief*, 325, § 563; 387, § 637.

<sup>2</sup> Downs *v.* *N. Y. Central R. R. Co.*, 47 *N. Y.*, 83.

§ 82. *Conduct against admissions*.—When there is conflicting testimony as to the admissions of the parties, the law will trust to the inferences to be drawn from their conduct rather than attempt to reconcile such conflict without regard to their conduct. Their acts clearly shown are more reliable than the recollection of words; and delay to sue is significant in this connection.

Russell *v.* Miller, 26 *Mich.*, 1.

ADVERSE POSSESSION.—[For the different rules of evidence to prove adverse possession for the purpose of avoiding a deed, and for the purpose of the Statute of Limitations, see Crary *v.* Goodman, 22 *N. Y.*, 170; Higinbotham *v.* Stoddard, 72 *Id.*, 94; aff'g 9 *Hun* (*N. Y.*), 1, and cases collected in 1 *Abb. N. Y. Dig.*, 36, etc., new ed., and 7 *Id. Supp.*, 17].

## AFFINITY

§ 83. *What*.—As to what constitutes affinity, and the mode of computing it, see *Criminal Trial Brief*, §§ 233, 235; and as to mode of proof, *Abb. Tr. Ev.*, p. 70, etc.

AGE.—[See also BIRTH, CHARACTER, and KNOWLEDGE.]

§ 84. Presumption.  
85. Direct testimony.  
86. Hearsay.  
87. Opinion.

§ 88. Cross-examining witness as to capacity to judge.  
89. Inspection.  
90. Age of document.  
91. Age of horse.

§ 84. *Presumption*.—Where nothing appears to the contrary, persons entering into an agreement are presumed adults and competent to contract.

*Foltz v. Wert*, 103 *Ind.*, 404; s. c., 1 *Western Rep.*, 852.

(So held on the question of the validity of a contract by heirs, affecting their rights on distribution.)

*Garber v. State*, 94 *Ind.*, 219.

§ 85. *Direct testimony*.—Age may be proved by the testimony of the person whose age is in question,<sup>1</sup> or that of any other person having proper sources of knowledge;<sup>2</sup> but not by opinion of a witness from appearances, unaccompanied by the facts on which that opinion is founded.

<sup>1</sup> *Abb. Tr. Ev.*, 87.

*Comm. v. Stevenson*, 142 *Mass.*, 466. (HOLMES, J.)

And his testimony is not rendered incompetent by his further statement, given as the reason for it "that his mother told him so, and that it was written down in a book, which his father had in his pocket, in the court house." *Cherry v. State*, 68 *Ala.*, 29.

<sup>2</sup> *Comm. v. O'Brien*, 134 *Mass.*, 198.

§ 86. *Hearsay*.—Age may be proved by hearsay, when in question as a fact of pedigree.<sup>1</sup> But not where the case is not one of pedigree, as for instance where the object is to establish infancy as a defence<sup>2</sup> or as an element in the crime of abduction.<sup>3</sup>

<sup>1</sup> Per Ld. BROUGHAM, *Monkton v. Atty. Gen.*, 2 *Russ. & M.*, 147, 158; *Abb Tr. Ev.*, 97-101.

*Green v. Norment* (*D. C.*, 1886), 3 *Central Rep.*, 784, 788.

[A question of pedigree is one which involves a question of parentage or descent.]

<sup>2</sup> *Haines v. Guthrie*, *L. R.*, 13 *Q. B. Div.*, 818; s. c., 51 *Law Times R.* (*N. S.*), 645.

*Kobbe v. Price*, 14 *Hun* (*N. Y.*), 55 (family record, and passport, excluded).

To same effect *Conn. Mut. Life Ins. Co. v. Schwenk*, 94 *U. S.*, 593; s. c., 24 *Law. ed.*, 294 (excluding hearsay on the question of the age of the insured in a life policy).

*The contrary* was in effect held, without discussing the applicability of the rule, in *Hunt v. Supreme Council of Chosen Friends* (*Mich.*, 1887), 7 *Western Rep.*, 875; and in *Kennedy v. Doyle*, 10 *Allen* (*Mass.*), 161.

<sup>3</sup> *People v. Sheppard*, 44 *Hun* (*N. Y.*), 565.

*Otherwise*, now by statute in New York. *L.* 1888, p. 201, c. 145, amd'g *Pen. Code*, § 19.

§ 87. *Opinion*.—An ordinary witness having testified to the appearance of a person, may state his opinion as to the person's age.

Robinson v. Blakely, 4 *Rich. Law (S. C.)*, 586 ; s. c., 55 *Am. Dec.*, 703.

Lawson Opin. Ev., 493, citing Benson v. McFadden, 50 *Ind.*, 431 ; Morse v. State, 6 *Conn.*, 19 ; Marshall v. State, 49 *Ala.*, 21.

And see BIRTH.

§ 88. *Cross-examining witness as to capacity to judge*.—A witness who has given his opinion as to the age of a person, may be asked on cross examination to give his opinion as to the age of a bystander, and the bystander may be called to testify to his age in rebuttal, to show that the opinion of the first witness is of little value.

Louisville, N. A. etc. R. Co. v. Falvey, 104 *Ind.*, 409 ; s. c., 3 *Northeastern Rep.*, 389, 397.

[The contrary principle applies in case of an opinion on a subject wholly a matter of opinion, such as the value of land ; where the capacity of one witness cannot be impugned by contradicting his opinion as to the value of another parcel, not within the issue.]

§ 89. *Inspection*.—Age is determinable by inspection, by court or jury ;<sup>1</sup> and by examination by experts, and receiving their opinions as witnesses.<sup>2</sup>

<sup>1</sup> People *ex rel.* Ziegler v. Special Sessions, 10 *Hun (N. Y.)*, 224.

*N. Y. Pen. Code*, § 19 ; am'd by L. 1888, p. 201, c. 145.

See also *Criminal Trial Brief*, 339, § 588.

In Comm. v. Emmons, 98 *Mass.*, 6, it was held competent for the jury to take into consideration, on the question of the age of a witness and whether he was a minor, his appearance on the stand. BIGELOW, C. J., adds : "There are cases where such an inspection would be satisfactory evidence of the fact." This case was followed in Keith v. New Haven & N. R. Co., 140 *Mass.*, 175 ; s. c., 3 *Northeastern Rep.*, 28.

In Bird v. State, 104 *Ind.*, 384 ; s. c., 3 *Northeastern Rep.*, 827, the court held (but with some hesitation) on the authority of Ihinger v. State, 53 *Ind.*, 251, that the appearance of the person in question as seen by the jury and as manifested while testifying as a witness, was not competent evidence for the jury on the question whether one dealing with or entertaining him, acted in good faith believing him to be of age.

<sup>2</sup> *N. Y. Penal Code*, § 19.

§ 90. *Age of document*.—To qualify a witness to express

an opinion as an expert upon the age of handwriting, it is not enough that he has had long experience in passing upon the genuineness of writings old and new.

Clark v. Bruce, 12 *Hun* (N. Y.), 271; approved in Cheney v. Dunlap, 20 *Neb.*, 265; s. c., 29 *Northwestern Rep.*, 925.

Compare 18 *Am. L. Reg.* (N. S.), 273; People v. Brotherton, 47 *Cal.*, 388, 395. And see HAND WRITING.

In Eisfield v. Dill, 71 *Iowa*, 442; s. c., 32 *Northwestern Rep.*, 420, it was held that a witness who had been a county auditor; another who had been a teacher of penmanship for 25 or 30 years; and others who were attorneys, one of them of long practice, and all of whom stated that they were familiar with old papers and writings, and thought they were capable of giving an opinion upon the question, were competent; and that it was not necessary that such a witness should have chemical knowledge.

§ 91. *Age of horse*.—An impression or cast of the mouth of the horse, proved by the person who took it, is admissible in evidence as to its age.

Earl v. Lefler, 46 *Hun* (N. Y.), 9. (It is classed with diagrams, photographs, etc.)

AGENCY.—[See also CONTRADICTION, CORROBORATION, AND RATIFICATION.]

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|---|--|
| I. PROVING AGENCY OR AUTHORITY.                             | §111. Unauthorized signing of name without indication of agency. |
| § 92. Reputation.   | 112. Unauthorized acts of wife or child.                         |
| 93. Direct testimony.                                       | 113. Relationship.   |
| 94. — by agent; to implied authority.                       | 114. Joint interest.   |
| 95. Necessity of written authority.                         | 115. Presumption of continuance.                                 |
| 96. — of sealed authority.                                  | 116. Scope of authority, local usage.                            |
| 97. Best and secondary evidence of authority.               | 117. — of agency; usage.   |
| 98. Conditions precedent.                                   | 118. — authority to indorse check.                               |
| 99. Admission of principal.                                 | 119. — to cancel contract.                                       |
| 100. Admissions and declarations of agent, to prove agency. | 120. — to receive payment of price.                              |
| 101. — by connection with evidence of ratification.         | 121. — — of negotiable paper.                                    |
| 102. Appearing to be in charge of business.                 | 122. — — bond and mortgage.                                      |
| 103. Ownership and use.                                     | 123. Ratification.   |
| 104. Form of commercial documents.                          | 124. — as a new act.   |
| 105. Charging a commission.                                 | II. DISPROVING AGENCY OR AUTHORITY.                              |
| 106. Opinion as to powers.                                  | 125. General reputation.   |
| 107. Course of dealing.                                     | 126. Separation of husband and wife.                             |
| 108. — transactions with other persons.                     | 127. Separation the same.  |
| 109. — similarity of transactions.                          | 128. Revocation.   |
| 110. — single transaction not enough.                       | 129. — by death or incapacity.                                   |



I.—PROVING AGENCY OR AUTHORITY.

§ 92. *Reputation*.—Evidence that one alleged to be agent for the defendant is reputed to be such agent is incompetent, unless as part of evidence of holding out to the world as agent.

*Perkins v. Stebbins*, 29 *Barb.* (N. Y.), 523. Otherwise of revocation, see § 125.

§ 93. *Direct testimony*.—Testimony that a person was acting as agent not objectionable as involving only legal conclusions.

*Knapp v. Smith*, 27 *N. Y.*, 277.

S. P., *Matter of N. Y. Central etc. R. R. Co.*, 33 *Hun* (N. Y.), 274 (testimony that he was acting under instructions from the president, presumptive evidence of agency for company).

Otherwise of testimony to fact of agency as a conclusion of law. *Guy v. Lee*, 81 *Ala.*, 163.

§ 94. — *by agent; to implied authority*.—When the alleged agent is examined as a witness on a question of implied authority, he should be required to state the facts relied on as raising implied authority, and should not be asked whether or not he had authority to do the act in question, for this is asking for a conclusion.

*Abb. Tr. Ev.*, 43, citing *Providence Tool Co. v. U. S. Manuf. Co.* 120 *Mass.*, 35 (action on a promissory note of a corporation signed "G. F., treasurer." Error to allow the defendant to ask G. F. whether or not he had authority to make the note in question).

S. P., *Short Mountain Coal Co. v. Hardy*, 114 *Id.*, 197 (action for over-payment of goods: no error to exclude question).

§ 95. *Necessity of written authority*.—A statute requiring an act to be done in writing, but not requiring a seal, does not by implication require that the authority of an agent to do the act in the name of his principal be also in writing; and oral authority is not incompetent, even though a seal was unnecessarily used by the agent.

*Worrall v. Munn*, 5 *N. Y.*, 229 (executory contract for sale of land).

S. P., *McWhorter v. McMahan*, 10 *Paige* (N. Y.), 386, 394; aff'g *Clarke*, 400 (executory contract to convey lands signed by one partner in firm's name).

*Merritt v. Clason*, 12 *Johns.* (N. Y.), 102; aff'd in 14 *Id.*,

484. (Broker's note binding both parties under statute of frauds.)

S. P., *Dykens v. Townsend*, 24 N. Y., 57, and cases cited.

First Nat. Bk. of Utica *v. Ballou*, 40 N. Y., 155 (authority to make new promise in writing which will take debt out of statute of limitations). [Distinguished in *McMullen v. Rafferty*, 24 Hun (N. Y.), 363, 366.]

§ 96. — *of sealed authority.*—A statute requiring an act to be done under seal, by implication requires that the authority of an agent to do the act in the name of his principal be also under seal.

If the statute only requires the act to be in writing, the fact that a seal is used does not require that the authority executing it to be under seal.

*Worrall v. Munn*, 5 N. Y., 229 (holding that the common law rule that the authority to execute a deed must always be by deed is to this extent relaxed under American authorities).

§ 97. *Best and secondary evidence of authority.*—Where there is no general evidence of agency or of holding out as agent, and the party seeking to prove agency relies on specific authority for a particular act, such authority, if in writing, cannot be proved by oral evidence, unless a foundation for secondary evidence is first laid.

*United States v. Boyd*, 5 How. (U. S.), 29; s. c., 12 Law. ed., 36. (In this case held that sureties seeking to show concealment on the part of the government of defalcations existing when their bond was taken, could not prove that an examination of the officer's accounts was made by one presenting a letter as written authority to make the examination, without producing the letter or accounting for its absence.)

When agency was constituted by writing and is directly in issue it cannot be proved orally, until a foundation for secondary evidence has been laid. *DeBaril v. Campoy y Pardo* (Pa., 1887), 7 Central Rep., 643; s. c., 8 Atl. Rep., 76; 20 W. N. C., 65.

Nor varied by oral evidence, *Bowman v. Tagg* (Pa., 1887), 6 Central Rep., 563 (power of attorney).

§ 98. *Conditions precedent.*—Where conditions precedent imposed upon the existence of an agency must be performed before the delegated authority exists at all, the burden is on the party claiming to bind the principal by the agent's acts, to show that such conditions have been fulfilled.

*Parker v. Saratoga County*, 106 N. Y., 398; s. c., 9 Cent. Repr., 263, 276; 13 Northeast. Rep., 308.

There is a distinction between a conditional authority, where the condition precedent must be performed before the exercise of the authority, and an absolute authority within certain limitations peculiarly within the agent's knowledge, where the representations of the agent that his act is within such limitations are binding upon the principal. *Merchants' Bk. of Canada v. Griswold*, 72 N. Y., 412; s. c., 28 Am. Rep., 159; aff'g 9 Hun (N. Y.), 561, and citing cases.

§ 99. *Admission of principal.*—The admission of the principal as to the fact or scope of agency, whether such admission be express, or implied, is competent against the principal,<sup>1</sup> unless the act authorized is required by law to be under seal, or the authority is required by law to be in writing.<sup>2</sup>

<sup>1</sup> *Doyle v. St. James' Church*, 7 Wend. (N. Y.), 179 (holding an express admission of the authority of the agent, sufficient to support referee's finding of money paid by defendant).

*Johnson v. Ward*, 6 Esp., 47 (holding agent's affidavit used upon a motion for adjournment put in by defendant, the principal,—admissible to prove the fact of agency).

<sup>2</sup> *Blood v. Goodrich*, 9 Wend. (N. Y.), 67, and again after new trial, 12 Id., 525 (applying this rule to exclude evidence that the principal had orally admitted the existence of written authority, until a foundation for secondary evidence had been laid). S. P., ADMIS- SIONS, § 70.

§ 100. *Admissions and declarations of agent,—to prove agency.*—Although the admissions and declarations of a person even if made at the time of the act, are not evidence (except as against himself) of the fact of his agency,<sup>1</sup> nor of its scope, unless connection with the alleged principal is shown; yet slight evidence is sufficient to show connection;<sup>3</sup> and when any competent evidence of the fact has been received, the declarations of the alleged agent as to the fact of his agency,<sup>4</sup> or its scope<sup>5</sup> made in the course of the transaction in question, are competent.

<sup>1</sup> *Howard v. Norton*, 65 Barb. (N. Y.), 161.

*Sax v. Davis*, 71 Iowa, 406; s. c., 32 Northwestern Rep., 403; *Memphis etc. V. R. Co. v. Cocke*, 64 Miss., 713; s. c., 2 Southern Rep. 495.

S. P., *Stringham v. St. Nicholas Ins. Co.*, 4 *Abb. Ct. App. Dec.* (N. Y.), 315, 320. (Entries in a policy book kept by a local insurance agent not admissible to show the power of the agent to assent to an assignment of the policy.)

*Marvin v. Universal Life Ins. Co.*, 85 *N. Y.*, 278, 282. (Signing receipt as "general agent" insufficient in absence of any evidence showing knowledge on the part of the principal of the agent's assumption of such title of authority.)

*Deck v. Johnson*, 1 *Abb. Ct. App. Dec.* (N. Y.), 497 (declarations of husband to bind wife's separate estate.)

*Brigham v. Peters*, 1 *Gray (Mass.)*, 139, 145.

*Proctor v. Tows*, 115 *Ill.*, 138; s. c., 3 *Northeast. Rep.*, 569.

*French v. Wade*, 35 *Kan.*, 391; s. c., 11 *Pacific Rep.*, 138.

*Combs v. Hodge*, 21 *How. (U. S.)*, 397; 16 *Law. ed.*, 115 (holding agent's letter insufficient to prove that he had the power of attorney mentioned in it).

*Russell v. State*, 71 *Ala.*, 348. (Criminal case.)

<sup>2</sup> *Abb. Tr. Ev.*, 480.

<sup>3</sup> See §§ 102-108.

<sup>4</sup> *Corning v. Walker*, 14 *N. Y. Week. Dig.*, 314 (holding that after another witness had testified that the alleged agent was general manager, evidence of the declaration of the latter to the same effect became competent. Reversal for exclusion).

And it makes no difference that the agent did not disclose the fact that he was acting as agent. *Ferguson v. Hamilton*, 35 *Barb. (N. Y.)*, 427, 441, 442.

<sup>5</sup> Where an agent has authority to draw drafts if necessary, his representations in negotiating one as to its necessity and purpose, are part of the *res gestæ*. *Merchants' Bank of Canada v. Griswold*, 72 *N. Y.*, 472; s. c., 28 *Am. R.*, 159; aff'g 9 *Hun (N. Y.)*, 561.

§ 101. —*by connection with evidence of ratification.*—Evidence that the alleged agent said he was agent is competent in connection with an offer to prove ratification of his act, or with other evidence tending to show a holding out.

*Howard v. Norton*, 65 *Barb. (N. Y.)*, 161, 165.

§ 102. *Appearing to be in charge of business.*—To sustain an inference that a person had authority to represent a party in the ordinary incidents of business, it is sufficient

to show that, at the time of the transaction in question, such as making a demand or offer or giving a notice, he was apparently in charge of the business at the proper place in the party's place of business.<sup>1</sup>

So after proving that the principal acted through an agent, conversation with a person representing himself to be such agent without further identification is competent.<sup>2</sup>

But the mere fact of being employed about the principal's place is not enough.<sup>3</sup>

<sup>1</sup> *Leslie v. Knickerbocker Ins. Co.*, 63 *N. Y.*, 27 (holding in an action on an insurance policy that the jury could well find, in the absence of any evidence to the contrary, that the person who stood behind the cashier's desk in the company's office was authorized to bind the company by a promise to give the assignee of the policy notice of the time when the premiums were payable).

*Curtis v. Murphy*, 63 *Wisc.*, 4 (night clerk in charge of hotel office assigning rooms presumed to have authority to take charge of money of a guest for safe-keeping).

*Clifford v. Barton*, 1 *Bing.*, 199 (wife shown to have been seen in husband's store on more than one occasion apparently conducting the business in his absence, presumed to have authority to offer to settle for a bill of goods delivered there).

*Dunn v. Star Fire Ins. Co.*, 19 *N. Y. Weekly Dig.*, 531 (person apparently in charge of the defendant's office for the transfer of stock on the defendant's books, presumed in the absence of evidence to the contrary to have authority to represent the company for purpose of transferring stock).

*Indiana, B. & W. R. Co. v. Adamson*, 114 *Ind.*, 282; s. c., 12 *Western Rep.*, 708; 15 *Northeast. Rep.*, 5; *Bush v. Brooks* (*Mich.*, 1888), 14 *Western Rep.*, 889; s. c., 38 *Northwestern Rep.*, 562. (Openly acting as chief engineer of a railroad in supervising its work.)

<sup>2</sup> *Titus v. Glens Falls Ins. Co.*, 8 *Abb. N. C.*, 315; s. c., 81 *N. Y.*, 410.

<sup>3</sup> *Larter v. Am. Female Guard. Soc.*, 1 *Robt. (N. Y.)*, 598.

§ 103. *Ownership and use.*—To sustain an inference in favor of a third person, that a person in charge of property was the agent or servant of a party, it is sufficient to show that the property belonged to such party.

*Morris v. Kohler*, 41 *N. Y.*, 42, rev'g 1 *Sweeny* (*N. Y.*), 39 (team running away, holding that evidence that a runaway team which injured plaintiff belonged to defendant, was sufficient to submit to the jury the question whether the driver was defendant's servant.)

§ 104. *Form of commercial documents.*—The form of invoices or similar communications passing between the alleged principal and agent is competent evidence as against either, as tending to show the fact<sup>1</sup> and character<sup>2</sup> of the agency.

<sup>1</sup> *Armstrong v. Stokes*, *L. R.*, 7 *Q. B.*, 598; s. c., 3 *Moak's Eng.*, 217 (form of bill of invoice from agent to principal, as showing agency, to sustain action against an undisclosed principal).

The form of the invoice is not conclusive. *Beebe v. Mead*, 33 *N. Y.*, 587.

Compare *Sutton v. Crosby*, 54 *Barb.* (*N. Y.*), 80, where a bill of items was held evidence of a sale.

<sup>2</sup> *Whittaker v. Chapman*, 3 *Lans.* (*N. Y.*), 155, 157 (holding that in an action brought by a principal against factors for proceeds of goods consigned, where defendants denied that they acted in a fiduciary capacity, their circular delivered to plaintiff before their dealings commenced, soliciting consignments, and a bill of invoice and stencil plate with their firm name, were admissible as tending to show the character in which they acted).

§ 105. *Charging a commission.*—The charging by the alleged agent of a commission is evidence of the relation of principal and agent, if there is some evidence to connect the principal therewith.

*Armstrong v. Stokes*, *L. R.*, 7 *Q. B.*, 598; s. c., 3 *Moak's Eng.*, 217. (Here the connection was shown by evidence that such charge was in accordance with the usual course of business between them in filling other orders.) Compare *Greenwood v. Schumacker*, 82 *N. Y.*, 614, where making a profit was held some evidence of a sale.

But compare *Clough v. Whitcomb*, 105 *Mass.*, 482, where it was held error to instruct the jury that the allowance of a commission to one who *solicits orders*, for sales effected through such orders proves that he was an agent to make a sale binding the principal.

§ 106. *Opinion as to powers.*—A question which in effect calls for the opinion of a witness as to the extent of the

agent's powers, without showing the source of his knowledge on the subject is incompetent.

*Benninghoff v. Agricultural Ins. Co.*, 93 *N. Y.*, 495, 500 (holding in an action on an insurance policy issued by an alleged agent, that a question addressed by the defendant's counsel to its secretary as to "what was J.'s authority as agent of the company," was properly excluded).

It was said there that the proper way to prove his authority was by the production of the power of attorney issued to him or by resolution of board of directors.

*Green v. Boston & L. Railroad*, 128 *Mass.*, 211, 225 (holding that an agent shown to have been held out, etc., cannot be asked on cross-examination if he had any authority to do the act in question).

§ 107. *Course of dealing*.—The acts of an alleged agent are themselves competent evidence of agency if they are of such character and so continued, as to justify a reasonable inference that the principal had knowledge of them and would not have permitted them if unauthorized.<sup>1</sup>

Very slight evidence of this kind is sufficient to go to the jury against the alleged principal; as the latter has power to show the contrary at once, if the fact were otherwise, and that the acts of the agent were without his knowledge or authority.<sup>2</sup>

<sup>1</sup> *Reynolds v. Collins*, 78 *Ala.*, 94 (continuous acting of a person as bank cashier and proof of dealings with him by various persons in that capacity).

<sup>2</sup> *Flynn v. Equitable Life Ins. Co.*, 78 *N. Y.*, 568, 575 (holding, in an action on an insurance policy procured through an alleged sub agent of one who the company denied had power to appoint a sub agent, that the production of a letter from the agent to the sub agent bearing a printed direction to the postmaster thereon, to return it to the company if not called for, and another envelope on the back of which was the agent's name lithographed describing him as general agent, and letters addressed to him at such office thus tending to show that he transacted business there, were sufficient to cast upon the company the onus of showing the real truth of its relations to the agent).

*Western Trans. Co. v. Hawley*, 1 *Daly (N. Y.)*, 327 (where in an action by a carrier for extra lighterage for the removal of a cargo consigned to the defendant

from one pier to another, the only evidence of a direction for the removal was a request signed in their name by the person who appeared by the bill of lading to have been the agent who shipped the cargo, and who had been seen in and about their office, and it being shown that the defendants received the goods at the pier to which they were accordingly removed).

*Platner v. Platner*, 78 *N. Y.*, 90 (repeated acts of husband, on behalf of his wife, competent in a conflict of testimony, as showing his agency for her in another act. [See CONTRADICTION and CORROBORATION.]

*Marine Bank of N. Y. v. Clements*, 31 *N. Y.*, 33; aff'g 6 *Bosw. (N. Y.)*, 166 (uniform practice of corporation to raise money on paper endorsed by its president, competent as showing his authority to indorse another note).

(Compare *Bunten v. Orient Mutual Ins. Co.*, 4 *Bosw. (N. Y.)*, 254, and see further decision in 8 *Id.*, 448 (that to justify a jury in finding that an agent was allowed by his principal to transcend the limitations of his expressed authority, evidence must show, if not a succession of cases, at least several, in which the agent had done acts similar to those for which authority is claimed, and the subsequent acquiescence of the principal therein, upon their coming to his knowledge.)

As against the alleged agent, evidence that he acted as agent in former transactions may be incompetent. *Richards v. Millard*, 56 *N. Y.*, 574; rev'g 1 *Supm. Ct. (T. & C.)*, 247, where in an action by the alleged principal to call the alleged agent to account,—*held*, error to charge that the jury might consider the previous relations as bearing on the probability of the existence of agency in the transactions now in question.

§ 108. —*transactions with other persons.*—Evidence of transactions similar to the one in question, sufficient to establish a habit or course of dealing is admissible, whether such transgressions are between the parties<sup>1</sup> or the alleged principal and third persons.<sup>2</sup>

<sup>1</sup> *Gallinger v. Lake S. Traffic Co.*, 67 *Wisc.*, 529; s. c., 30 *Northwest. Rep.*, 789, 794.

<sup>2</sup> *Beattie v. Del. L. & W. Ry. Co.*, 90 *N. Y.*, 643; s. c., 15 *N. Y. Weekly Dig.*, 338, aff'g 12 *Id.*, 334 (holding in an action against a corporation for stone sold and delivered to an alleged agent, that his authority to buy may be established by proof of a similar purchase by the agent and payment by the defendant therefor). *Wood v. Auburn & R. Ry. Co.*, 8 *N. Y.*, 160 (authority of agent to submit to arbitration inferred from



- evidence of principal's acquiescence in similar submissions).
- Merchants' Bank v. State Bank*, 10 *Wall. (U. S.)*, 604 (presumption of the authority of a bank cashier to buy gold, from the usual buying of exchange).
- Hill v. National Trust Co.*, 108 *Pa. St.*, 1 (authority of an assistant bank teller to certify checks as "good" shown by evidence of a course of dealing as between himself, his principals and the bank customers).
- Chrysler v. Gray*, 17 *N. Y. Weekly Dig.*, 446 (holding that where a seminary student arranged with the principal of the school to pay his board due the plaintiff, with services to the principal as teacher, testimony of another student going to show that he had made his arrangements for board with the principal of the school, and took his receipts from him with the knowledge of the plaintiff, was admissible).
- Hammond v. Varian*, 54 *N. Y.*, 398 (holding that in an action against a father and son upon a promissory note, purporting to be executed by them as joint makers, which was given in the business of latter and was unquestioned by him, but which was disputed by the former, he claiming that his signature thereto was a forgery, evidence tending to prove that he had recognized the validity of and his liability upon other similar notes which he himself had not signed after full knowledge that the signature was not his handwriting, was held properly received in conjunction with evidence that the signature was, in fact, made by the son as tending to show authority in the latter to sign).
- Compare*, with the last case, *Shisler v. Vandike*, 92 *Pa. St.*, 447; s. c., 37 *Am. Rep.*, 702 (holding that a forged indorsement cannot be ratified by the person whose name is forged, as the act is criminal and against public policy. Following *McHugh v. Schuylkill*, 67 *Pa. St.*, 391; s. c., 5 *Am. Rep.*, 445).
- S. P., Workman v. Wright*, 33 *Ohio St.*, 405; s. c., 31 *Am. Rep.*, 546.
- The distinction between a void and voidable act so far as it is susceptible of ratification by the principal seems to be this: where the fraud is of such character as to involve a crime, the ratification of the act from which it springs is opposed to public policy and hence cannot be permitted. But where the transaction is contrary only to good faith and fair dealing, where it affects individual interests only, ratification is allowable. *Shisler v. Vandike (above)*.
- But see *People v. Bank of North Am.*, 75 *N. Y.*, 547 (holding that where a clerk had been generally prohibited from indorsing drafts, and specially forbidden on several occasions, the fact that he did indorse

them in a few instances without disapproval, is immaterial upon the question of his actual authority, and insufficient under the circumstances to justify an inference of his implied authority).

§ 109. —*similarity of transactions.*—One who seeks to support a transaction with an agent had in the agent's name instead of that of the principal, by a previous course of dealing implying authority, should show that the form of the previous transactions were such as to justify reliance on the agent's authority.

Hogarth *v.* Wherley, *L. R.* 10 *Com. Pl.*, 630; s. c., 14 *Moak's Eng.*, 474, where it was held that an agent of a firm who took a draft from their debtor payable to "my order" instead of to "our order," is not presumed to have been authorized, from mere proof that he had previously taken drafts in the course of his agency, unless the form of the previous drafts is shown. *Abb. Tr. Ev.*, 400.

§ 110. *Single transaction not enough.*—Evidence of a single isolated transaction of a similar kind is not alone admissible for the purpose of showing agency.

Morris *v.* Bethell, *L. R.* 4 *Com. Pl.*, 765; and 5 *Id.*, 47. But see Wilcox *v.* Chicago etc. Ry. Co. (*Minn.*, 1877), 5 *Reporter*, 114, where it is said: "a single act of the agent and a recognition of it by the principal may be so unequivocal, and of so positive and comprehensive a character as to place the authority of the agent to do similar acts for the principal beyond any question." But the point does not seem to have been much considered.

§ 111. *Unauthorized signing of name without indication of agency.*—Where relations such as tend to show agency appear, evidence that the assumed agent had previously signed the name of the other party in similar transactions, and that the latter with knowledge that his name had been so used, recognized the signatures as if his, is competent as tending to show an implied authority to sign his name.

Hammond *v.* Varian, 54 *N. Y.*, 398.

Abeel *v.* Seymour, 6 *Hun (N. Y.)*, 656.

Whether reliance thereon must be shown, see Weed *v.* Carpenter, 4 *Wend. (N. Y.)*, 219; Morris *v.* Bethell, *L. R.*, 5 *Com. Pl.*, 47; 4 *Id.*, 765; see also *Abb. Tr. Ev.*, 292.

§ 112. *Unauthorized acts of wife or child.*—The payment

or other ratification of obligations incurred without authority by a wife or child does not necessarily imply authority to incur similar obligations.

*Green v. Disbrow*, 56 *N. Y.*, 334, holding it error to receive in evidence that the father paid other debts of his son to other persons, as tending to show that the son acted as agent for the father in contracting the debt sued for.

[Distinguished in *Wallis v. Randall*, 81 *N. Y.*, 164, 168; aff'g 16 *Hun (N. Y.)*, 33.]

And see, *Butts v. Newton*, 29 *Wisc.*, 632 (where there was no pretense in the evidence that the alleged principal had authorized his wife to act as his agent at any time before she did the acts complained of by him, and it was held that the ratification of one or more of these unauthorized acts was not evidence tending to show her authority to do others or tending to ratify them).

Cited in *Gallinger v. Lake Shore Traffic Co.*, 67 *Wisc.*, 529; s. c., 30 *Northwest. Rep.*, 789, 794.

§ 113. *Relationship*.—Mere relationship will not sustain an inference of agency.

*Le Count v. Greenley*, 6 *N. Y. State Rep.*, 91. (Act of father of defendant without any authority in employing plaintiff, a real estate broker, to sell defendant's real estate.) *S. P.*, *McNamara v. McNamara*, 62 *Ga.*, 200.

*Fecheimer v. Peirce (Mich., 1888)*, 14 *Western Rep.*, 648; s. c., 38 *Northwestern Rep.*, 325 (husband not presumed wife's agent).

§ 114. *Joint interest*.—Proof of joint interest or joint liability is not alone usually sufficient to raise a presumption of agency.

*Wallis v. Randall*, 81 *N. Y.*, 164; rev'g 16 *Hun (N. Y.)*, 33, and citing cases.

*Contra, Steph. Dig. L. Ev.*, art. 17.

And see *Black v. Lamb*, 1 *Beasl. (N. J.)*, 108, 122; *Cady v. Shepherd*, 11 *Pick. (Mass.)*, 400; *Lowe v. Boteler*, 4 *Harr. & M. (Md.)*, 346.

See the principle stated in *Abb. Tr. Ev.*, 188, 189.

§ 115. *Presumption of continuance*.—The rule that agency proved once to have existed is presumed in the absence of evidence to the contrary to have continued,<sup>1</sup> does not apply to a special agent of such class that a person dealing with him is bound to ascertain the limits of his authority,<sup>2</sup> nor as

between principal and agent where no general agency has been shown, but only a succession of transactions.<sup>3</sup>

<sup>1</sup> *Fassin v. Hubbard*, 55 *N. Y.*, 465 (holding that it having been shown that H. was general agent of a dissolved firm in liquidation in 1860-61 it would be presumed that he was such agent in 1862, unless the contrary be shown).

<sup>2</sup> *Crane v. Evans*, 1 *N. Y. State Rep.*, 216. DANIELS, J.

<sup>3</sup> *Richards v. Millard*, 56 *N. Y.*, 574; rev'g 1 *Supm. Ct. (T. & C.)*, 247. (Holding a charge that the jury had a right to look into the pre-existing relations as bearing upon the probabilities of agency in a later transaction erroneous).

§ 116. *Scope of authority,—local usage.*—Usage in a particular trade is admissible for the purpose of showing the scope of the agent's authority, whether this usage be known to the principal or not, it being assumed that the parties must have contracted subject to or with reference to such usage.<sup>4</sup>

But neither express authority, nor authority implied by law as an incident of the relation between the parties, can be varied or enlarged by evidence of a local usage in the particular trade.<sup>2</sup>

<sup>1</sup> *Browne on Law of Usage and Customs*, 90, 91, citing *Bayliffe v. Butterworth*, 1 *Exch.*, 425, and other cases.

<sup>2</sup> *Higgins v. Moore*, 34 *N. Y.*, 417 (usage in New York allowing brokers to receive payment for grain sold by them when the seller resides out of the city incompetent).

*Wheeler v. Newbould*, 16 *N. Y.*, 392; aff'g 5 *Duer (N. Y.)*, 29 (local custom in New York city to sell commercial paper, pledged as security for a loan at private sale and for the best price obtainable).

*Dykers v. Allen*, 7 *Hill (N. Y.)*, 497 (usage among brokers to hypothecate or dispose of stock at pleasure, which had been pledged with them and on payment of the debt to return an equal number of shares of the same kind).

But see *Lamson v. Sims*, 48 *N. Y. Super. Ct. (J. & S.)*, 281 (holding that the facts that an agent was authorized by his principal to sell certain real estate, and that it was the custom of the locality to make such sales through brokers, are sufficient to authorize a finding of authority in the agent to employ a broker to negotiate the sale).

§ 117. *Scope of agency : usage.*—On a question of implied authority, evidence of custom or usage in a particular trade or business is admissible to prove or disprove the scope of the agent's authority.

*Compare* Commercial Mut. Marine Ins. Co. v. Union Mut. Ins. Co. of N. Y., 19 *How. (U. S.)*, 318 ; s. c., 15 *Law. ed.*, 636 (proof that presidents of insurance companies in a city had been accustomed to contract orally for issuing policies held evidence of their authority).

*Turner v. Keller*, 66 *N. Y.*, 66 (custom to give notes for goods).

§ 118. *Authority to indorse check.*—Authority to collect does not imply authority to indorse with the principal's name a check taken in collection and expressed to be payable to the principal or his order.

*Robinson v. Chemical Nat'l B'k*, 86 *N. Y.*, 404 ; aff'g 10 *N. Y. Weekly Dig.*, 315 (action against bank for conversion).

§ 119. —*to cancel contract.*—An authority to make a contract for another is not evidence of authority to cancel or surrender it.<sup>1</sup> But a general express authority to make contracts in the course of a business, implies authority to cancel or surrender contracts made thereunder.<sup>2</sup>

<sup>1</sup>*Stilwell v. Mutual L. Ins. Co.*, 72 *N. Y.*, 385, 392 (holding, in an action by a wife to have restored a policy of insurance taken out by her husband on the latter's life, as her agent, which had been surrendered by him to the company, that the trial judge was justified in finding that the surrender was made without her knowledge or consent).

*Indianapolis Rolling Mill v. St. Louis etc. R. R. Co.*, 120 *U. S.*, 256 ; 30 *Law. ed.*, 639 ; 7 *Sup. Ct. Rep.*, 542 ; aff'g 26 *Fed. Rep.*, 140 (president and superintendent having authority to bind the company by unsealed contracts, has implied authority, in good faith to release any such contract he has made).

<sup>2</sup>*Anderson v. Coonley*, 21 *Wend. (N. Y.)*, 279 (holding that a general agent to buy, though in a particular business only, is presumed to have had power to rescind. Otherwise in case of implied authority arising from course of dealing).

*Harrison v. Burlingame*, 48 *Hun (N. Y.)*, 212. (Here the surrender of a valuable security was without consideration.)

§ 120. —*to receive payment of price.*—One selling for a known principal is not presumed from that fact alone, to have authority to receive payment.

Higgins v. Moore, 34 N. Y., 417 (sale by broker, of grain to be shipped by principal known to buyer).

§ 121. —*of negotiable paper.*—Mere possession by the alleged agent of negotiable paper so expressed or indorsed as to be payable to another person is not alone any evidence of authority to receive payment for that other.

Doubleday v. Kress, 50 N. Y., 410, rev'g 60 Barb. (N. Y.), 181; s. c., 10 Am. Rep., 502 (promissory note payable to order of payee and not indorsed by him).

S. P., Wardrop v. Dunlop, 1 Hun (N. Y.), 325; s. c., 3 Supm. Ct. (T. & C.), 531; aff'd without opinion in 59 N. Y., 634.

Compare Chappelle v. Martin, Ohio (1887), 9 Western Rep., 436; s. c., 12 Northeast. Rep., 448, and cas. cit. (Here the payee knew that the principal was dead.)

§ 122. —*of bond and mortgage.*—Under the rule that the possession of a bond and mortgage by the attorney of the mortgagee to whom, as such attorney, the interest had been paid, is sufficient evidence of his authority to receive the principal,<sup>1</sup> the person relying on such authority must show that on each occasion in respect to which it is relied on, the securities were in the attorney's possession.<sup>2</sup>

Authority of an attorney to receive the principal of a bond and mortgage not in his possession cannot be inferred from the facts that the loan was made through him, and that he drew the securities, and that he had authority to collect interest.<sup>3</sup>

<sup>1</sup> Williams v. Walker, 2 Sandf. Ch. (N. Y.), 325.

Followed in Megary v. Funtis, 5 Sandf. (N. Y.), 376, and approved in Smith v. Kidd, 68 N. Y., 130, 137.

See also Paley on Agency, 274, and cases there cited.

S. P., Brewster v. Carnes, 103 N. Y., 556, 564.

Stiger v. Bent, 111 Ill., 328.

Haines v. Pohlmann, 25 N. J. Eq., 179.

Adams v. Humphreys, 54 Ga., 496.

This presumption terminates with the principal's death. Megary v. Funtis, 5 Sandf. (N. Y.), 376.

<sup>2</sup> Williams v. Walker, 2 Sandf. Ch. (N. Y.), 325.

Quoted with approval in Smith v. Kidd, 68 N. Y., 130, 137.

<sup>3</sup> Smith v. Kidd, 68 N. Y., 130.

§ 123. *Ratification*.—The authority of an agent to do the act in question may be shown by evidence that the principal with full knowledge of the transaction, ratified it; and this ratification may be either express,<sup>1</sup> or implied from his acts<sup>2</sup> or from silent acquiescence<sup>3</sup> in the thing done.

<sup>1</sup> *First Nat'l Bank v. Ballou*, 49 *N. Y.*, 155, 158 (where the receipts for part payment of a note, given by the agent was shown the principal, and he approved of it).

<sup>2</sup> *Gold Mining Co. v. Nat'l Bank*, 96 *U. S.*, 640; s. c., 24 *Law. ed.*, 648 (holding that if an agent without authority borrows money in principal's name, who when it has been applied to his use and payment is demanded of him, fails within a reasonable time to disavow the act, the jury may consider him as assenting to the act). *Merchants Bank v. State Bank*, 10 *Wall. (U. S.)*, 604 (retention of money received through agent, after demand, sufficient proof of ratification).

*Abb. Tr. Ev.*, 242.

*Hankins v. Baker*, 46 *N. Y.*, 666 (where the party denying the agency received from the broker a warehouse order, retained it, and authorized an effort to sell the goods.)

*S. P., Thompson v. Gardiner*, *L. R.*, 1 *Com. Pl. Div.*, 777; s. c., 18 *Moak's Eng.*, 328 (evidence that the broker sent a note of the bargain to the buyer, who kept it without objection until called on to fulfill the contract, when he objected merely on the ground that the broker did not sign it). See also *Abb. Tr. Ev.* 329.

*Diedrick v. Richley*, 2 *Hill (N. Y.)*, 271 (authority of agent to submit to arbitration conclusively proved by evidence that the principal appeared and proceeded before the arbitrator).

<sup>3</sup> *Weed v. Carpenter*, 10 *Wend. (N. Y.)*, 404 (silence of endorser after receiving notice of protest, and failure to appear before default, and even then not until after the maker had absconded, competent to show ratification).

§ 124. —*as a new act*.—Ratification may be proved even by a person who dealt with notice that the alleged agent was without authority.<sup>1</sup>

For ratification is an adoption of the act, and not merely presumptive evidence of the authority.<sup>2</sup>

<sup>1</sup> *Commercial Bank of Buffalo v. Warren*, 15 *N. Y.*, 577.

<sup>2</sup> *Brisbane v. Adams*, 3 *N. Y.*, 129.

*Commercial Bank of Buffalo v. Warren*, 15 *N. Y.*, 577.  
But compare *Gorham v. Gale*, 7 *Cow. (N. Y.)*, 139.

*Contra*, in case of an unauthorized act not done for the principal's benefit. *Craighead v. Peterson*, 72 *N. Y.*, 279; *s. c.*, 28 *Am. Rep.*, 150; *aff'g* 10 *Hun (N. Y.)*, 596.

*Compare* *Meehan v. Forrester*, 52 *N. Y.*, 277, to the effect that blind acceptance of the benefit may be deemed an adoption of the agent's act.

Therefore ratification after suit brought is not competent as in a common law action showing adoption, but if at all only as evidence tending to show original authority.

## II.—DISPROVING AGENCY OR AUTHORITY.

§ 125. *General reputation*.—General reputation of revocation of agency may be competent as tending to show notice of it.

*Baker v. Barney*, 8 *Johns. (N. Y.)*, 72 (repute of husband and wife living under separation articles competent to terminate presumption of her agency for him).

§ 126. *Separation of husband and wife*.—Notice that husband and wife have separated and a suit for separation and alimony is pending, implies notice that the husband is no longer agent for his wife in matters in which he has been accustomed previously to act for her.

*Whitehead v. N. Y. Life Ins. Co.*, 102 *N. Y.*, 143; *s. c.*, 4 *Eastern Rep.*, 713; modifying 33 *Hun (N. Y.)*, 425, and holding that thereafter forfeiture of a policy on his life for her benefit, on his failure to pay premiums without notice to her, could not be sustained.

§ 127. *The same*.—No presumption of the wife's agency to bind the husband, as for instance for domestic supplies, exists after she has left him voluntarily and without cause.

*Johnston v. Sumner*, 3 *H. & N.*, 261; *Biffin v. Bignell*, 7 *Id.*, 877; *Abb. Trial Ev.*, 177.

§ 128. *Revocation*.—A general or continuing agency having been shown, he who relies on the principal's revocation must show notice given thereof; and as against persons theretofore accustomed to deal with the agent as such, notice must be brought home to them.

*Claffin v. Lenheim*, 66 *N. Y.*, 301, 305 (holding it error to submit to the jury the question of constructive no-



tice, in the absence of any evidence tending to show actual notice. The rule is the same as in case of partnership.

Compare *McNeilly v. Continental Life Ins. Co.*, 66 N. Y., 23, 28 (holding in action on an insurance policy, that evidence that after the insured had for a number of years paid the premiums to a local agent, the mailing to the insured of a postal card, with the words "remit direct to home office" was not sufficient proof of notice of revocation to warrant the trial judge to direct a nonsuit).

*Story on Agency*, § 470.

§ 129. —*by death or incapacity*.—Death<sup>1</sup> or incapacity<sup>2</sup> of agent or principal, or of one of a firm of agents, or of one of a firm of principals<sup>3</sup> is an instant revocation, irrespective of notice.<sup>3</sup>

A power coupled with an interest is not revoked by the death of the principal, nor by that of the agent.<sup>4</sup>

<sup>1</sup> *Martine v. International Life Ins. Co.*, 53 N. Y., 339, 342; s. c., 13 *Am. Rep.*, 529 (holding that the surviving partner of a firm of insurance agents could not bind the company by receipt of premium).

<sup>2</sup> *Salisbury v. Brisbane*, 61 N. Y., 617 (incapacity of one of the firm of agents).

<sup>3</sup> *Marlett v. Jackman*, 3 *Allen (Mass.)*, 287, 295.

<sup>4</sup> *Grapel v. Hodges*, 49 *Ham (N. Y.)*, 107.

*Contra*: *McKee v. Cochrane (D. C.)*, 1889; 17 *Wash. L. Rep.*, 219.

ALTERATIONS.—[See also ACCOUNTS, AGE, GENUINENESS, HANDWRITING.]

§130. Allegation.	§140. Description.
131. Effect of alteration, on competency as evidence.	141. Explaining, as immaterial.
132. What is material.	142. — as made by third person.
133. Inspection.	143. — — by consent.
134. Signature and body.	144. Extrinsic evidence to supply obliteration.
135. Effect of call for explanation.	145. Abstract or memorandum corroborating the testimony.
136. — of failure to explain.	146. Official document.
137. — of attempted explanation.	147. Certified copy.
138. — of alteration on validity.	
139. Competency of witness to explain.	

§ 130. *Allegation*.—If the allegation follows the original instrument only, production of the altered instrument may be a variance.<sup>1</sup>

If the allegation follows the alteration and not the original, then if the allegation is not put in issue the altered instrument is admissible, and evidence of the alteration is not admissible;<sup>2</sup> but if the allegation is put in issue, even by a general denial, objection to a material alteration is available.<sup>3</sup>

<sup>1</sup>And if the alteration is by the holder, in his own favor, it destroys the effect of the instrument as evidence. See § 138, and in that case even if such matter must, according to *Hirschman v. Budd*, *L. R.* 8 *Exch.*, 171; *s. c.*, 5 *Moak's Eng.*, 361, be specially pleaded, amendment ought to be allowed when the alteration is first disclosed at the trial.

<sup>2</sup>*Smedbergh v. Whittlesey*, 3 *Sandf. Ch.* (N. Y.), 320.

<sup>3</sup>*Schwartz v. Oppold*, 74 *N. Y.*, 307, aff'g 7 *Daly* (N. Y.) 121 (note sued on).

*Boomer v. Koon*, 6 *Hun* (N. Y.), 645 (where the rule is more fully reasoned).

*Beauerle v. Wriges*, 5 *N. Y. Weekly Dig.*, 363 (contract sued on, and counterclaim thereon alleged by defendant; and altered contract produced by defendant in support of his counterclaim).

§ 131. *Effect of alteration on competency as evidence.*—An instrument offered in evidence is not to be absolutely excluded merely because of a material alteration, even if appearing on its face.<sup>1</sup>

<sup>1</sup>*Pringle v. Chambers*, 1 *Abb. Pr.* (N. Y.), 58 (disapproving the noted ruling in Warren's "Ten thousand a year").

*Maybee v. Sniffen*, 2 *E. D. Smith* (N. Y.), 1 (well considered *dictum* by WOODRUFF, J., on a review of the cases. And the decision was affirmed in 16 *N. Y.*, 560, on the ground, so far as this point is concerned, that there was no proof that the alteration was made after execution).

§ 132. *What is material.*—Where the alteration is set up as a bar against enforcing the instrument the question is whether, if effective, it could in any event change the legal liability of the party or work to his prejudice.<sup>1</sup>

Where the alteration is objected to merely as requiring explanation before receiving the instrument in evidence, the question is whether it is material to the purpose for which the instrument is offered.<sup>2</sup>

The question of materiality is one of law, and solely for the court.<sup>2</sup>

<sup>1</sup>Booth v. Powers, 56 N. Y., 23; rev'g Flint v. Craig, 59 Barb. (N. Y.), 319.

<sup>2</sup>For illustration, see Hay v. Douglas, 8 Abb. Pr., N. S. (N. Y.), 217; s. c., 2 Sweeny (N. Y.), 49 (receiving deed as corroborative of testimony that a note was given on a purchase, notwithstanding interlineation in description of premises).

<sup>3</sup>Steele v. Spencer, 1 Pet. (U. S.), 552, 561; s. c., 7 Law. ed., 359.

S. P., Bell v. Bruen, 1 How. (U. S.), 169, s. c., 11 Law. ed., 89.

§ 133. *Inspection*.—The jury may be satisfied from an inspection of the paper itself that the alteration was before signing.

Hills v. Barnes, 11 N. H., 395, citing Gooch v. Bryant, 1 Shep. (Me.), 386, 390.

Smith v. United States, 2 Wall. (U. S.), 219, 232; s. c., 17 Law. ed., 788 (*Dictum*).

Rogers v. Vosburg, 81 N. Y., 228, only decides (upon this point) that where a material alteration after execution is alleged as a defence, the court cannot on mere inspection of the paper, without allowing extrinsic evidence, decide that it was made before execution.

§ 134. *Signature and body*.—Proof of signature and delivery is prima facie evidence that the body of the writing of which it appears to form a part, is genuine if uncontradicted by the party, he being present.

Comm. v. Coe, 115 Mass., 504, and see Simpson v. Davis, 119 Id., 269; s. c., 20 Am. Rep., 324.

§ 135. *Effect of call for explanation*.—If objection be made that the altered instrument is not sufficient to go to the jury, and the judge is satisfied both that the alteration is material to the purpose for which the instrument is offered, and that it is sufficiently suspicious to require explanation, before submitting the instrument to the jury, he may receive it subject to explanation, or on condition that counsel will give explanation.

Smith v. McGowan, 3 Barb. (N. Y.), 404, 407 (holding that whether the instrument or the explanation shall be first received is discretionary.)

Smith v. United States, 2 *Wall. (U. S.)*, 219, 231; s. c., 17 *Law. ed.*, 788.

Churchman v. Smith, 6 *Wharton (Pa.)*, 146; s. c., 36 *Am. Dec.*, 211, with *note* (reversible error to admit in evidence a book of entries erased and altered in a material part, without explanation).

§ 136. *Effect of failure to explain.*—If required explanation is not forthcoming, the judge may, if the suspicion be so clear as not to leave a question for the jury, exclude the document, or strike it out if already conditionally received; and, if the document be essential to the cause of action or defence, direct a nonsuit or verdict.

Tillou v. Clinton & Essex Mut. Ins. Co., 7 *Barb. (N. Y.)*, 564, 568.

S. P., Evans v. Deming, 20 *N. Y. Weekly Dig.*, 71.

§ 137. *Effect of attempted explanation.*—If explanation is given such that a verdict could be sustained on the instrument as explained, the instrument with all the evidence as to the alteration will go to the jury for their determination of the question of alteration.

The conflict in the cases when analysed turns chiefly on the question what instructions should be given the jury on the burden of proof.

I. Authorities holding that there is no presumption either way, but the paper should go to the jury with the evidence as a question solely for them:

Printup v. Mitchell, 17 *Ga.*, 558; s. c., 63 *Am. Dec.*, 258; Hunt v. Gray, 35 *N. J. L.*, 227; Hayden v. Goodenow, 39 *Conn.*, 164; Ely v. Ely, 6 *Gray (Mass.)*, 439.

II. Authorities holding that there is a presumption that an alteration in a deed was made before execution: Little v. Herdon, 10 *Wall. (U. S.)*, 26; s. c., 19 *Law. ed.*, 878; Long v. Patton, 19 *Law. ed. (U. S. S. Ct.)*, 881; White v. Hass, 32 *Ala.*, 470; Paramour v. Lindsey, 63 *Mo.*, 63.

Hanrick v. Patrick, 119 *U. S.*, 156, 172; s. c., 30 *Law. ed.*, 396.

[*Contra*, Ely v. Ely, 72 *Mass. (6 Gray)*, 439, holding it error to so charge; and that the burden is always on the party adducing the instrument; but that the appearance of the paper may be enough to sustain a finding that the alteration was made before execution.]

III. That the burden is on the party offering it, to explain. Jackson v. Osborn, 2 *Wend. (N. Y.)*, 555 (reversing for error in charging the contrary).

S. P., *Evans v. Deming*, 29 *N. Y. Weekly Dig.*, 71.

O'Donnell *v. Harmon*, 3 *Daly* (N. Y.), 424.

*Benj. Chal. Bills, n. and c.*, 259, art. 250. (So laid down as to one suing on altered instrument.)

IV. That if the alteration is not suspicious the burden is on the objector. *Ins. Co. of North America v. Brim*, 111 *Ind.*, 281; s. c., 9 *Western Rep.*, 833; 13 *Northeastern Rep.*, 315.

§ 138. *Effect of alteration on Validity.*—To invoke the rules that an alteration by the holder, in a material part, precludes him from recovering on it; and that fraudulent alteration by him in such a part precludes him from recovering even on the original consideration,<sup>1</sup> it must be affirmatively shown that the alteration was made by him.<sup>2</sup>

<sup>1</sup> *Meyer v. Huneke*, 55 *N. Y.*, 412 and cas. cit., rev'g 65 *Barb.* (N. Y.), 304.

See cases collected in note in 17 *Am. Rep.*, 97.

<sup>2</sup> *Van Brunt v. Van Brunt*, 3 *Edw. Ch.* (N. Y.), 14.

Alteration in an instrument which before alteration had already effected a transmutation of title or possession does not defeat it; for alteration cannot reconvey. *Lewis v. Payn*, 8 *Cow.* (N. Y.), 71; *Smith v. McGowan*, 3 *Barb.* (N. Y.), 404, 407.

§ 139. *Competency of witness to explain.*—Any witness having knowledge may testify to the time of the making or existence of an alteration, even though the instrument be one which can only be proved by a subscribing witness.

*Perry v. Corwithe*, 18 *Johns.* (N. Y.), 499.

§ 140. *Description.*—A witness may be questioned as to the facts apparent on the condition of a writing presented to him, as for instance whether its body and signature were written with the same ink; whether there appeared to be an erasure; and whether either edge was cut, or an ordinary foolscap edge;<sup>1</sup> and an expert may be interrogated as to whether an erasure was made before or after the body of the instrument was written.<sup>2</sup>

<sup>1</sup> *Dubois v. Baker*, 30 *N. Y.*, 325; aff'g 40 *Barb.* (N. Y.), 556.

<sup>2</sup> *Id.* But compare *Sackett v. Spencer*, 29 *Barb.* (N. Y.), 180; *Cheney v. Dunlap*, 20 *Nebr.*, 265.

*Phoenix Fire Ins. Co. v. Philip*, 13 *Wend.* (N. Y.), 81; and § 90, as to *age of writing*.

§ 141. *Explaining,—as immaterial.*—An unnoted erasure in a deed may be shown to be immaterial by oral evidence of the subject-matter referred to.

*Hanrick v. Patrick*, 119 *U. S.*, 156, 172; 30 *Law. ed.*, 396; 7 *Sup. Ct. Rep.*, 147 (so holding of an alteration changing the name of the grantee from Elizabeth to Eliza, explained by proof that both names indicate the same person).

§ 142. — *as made by third person.*—A material alteration in the instrument under which a party claims, may be explained by showing that it was made without his privity while the instrument was not in his possession, and by another party or a stranger; and if the nature and extent of the alteration and the original terms of the contract can be clearly ascertained, the alteration will not affect the party so claiming under the instrument.

*Martin v. Tradesmen's Ins. Co.*, 101 *N. Y.*, 498.

§ 143. — *as made by consent.*—An unnoted alteration even in a sealed instrument, may be explained by oral evidence that all parties consented to its being made.

*Speake v. United States*, 9 *Cranch (U. S.)*, 28. Erasure of one signature in bond, and substitution of another. It may be otherwise of an alteration in a matter required by statute.

§ 144. *Extrinsic evidence to supply obliteration.*—An instrument is not to be excluded because of an alteration or mutilation cancelling a material part, if there is no indication of fraud or intent to annul the instrument, and the lost words are supplied by extrinsic evidence.

*Polk v. Wendell*, 9 *Cranch (U. S.)*, 87, 97; s. c., 3 *Law. ed.*, 665 (here the sum fixed as the consideration of a grant had been obliterated by tearing it out. MARSHALL, CH. J., says: "Had the whole grant been lost, a copy might have been given in evidence; and it would be strange if the original should be excluded because a word which could not be mistaken, and which, indeed, is not essential to the validity of the grant, has become illegible").

§ 145. *Abstract or memorandum corroborating the testimony.*—An abstract or memorandum of the contents of the original instrument, with proof that it was correctly made

is competent in connection with the testimony of the witness who made it, to show that a deviation now apparent on the face of the original is a subsequent alteration.

Nat'l. Ulster Co. Bk. *v.* Madden, 41 *Hun* (N. Y.), 113.

§ 146. *Official document*.—The rule as to requiring explanation from the party offering an altered document, does not apply to an official record of a sworn officer, produced from the proper custody other than that of the party offering it.

People *ex rel.* Stone *v.* Minck, 21 N. Y., 539.

Devoy *v.* Mayor etc. of N. Y., 35 *Barb.* (N. Y.), 264 ;  
s. c., 22 *How. Pr.* (N. Y.), 226.

§ 147. *Certified copy*.—Alterations in a certified copy or an exemplification, are not alone ground for excluding it, if they are marked and verified as such by the initials of the authenticating clerk of the court.

Lazier *v.* Westcott, 26 N. Y., 146.

AMBIGUITY.—[See also ABBREVIATIONS, ADMISSIONS, INTENT, THREAT.]

§ 148. Symbol.

149. Absence of dollar mark.

150. Illegibility.

151. Blank.

152. Patent and latent.

§ 153. Surrounding circumstances.

154. Usage of the business.

155. Practical construction.

156. Creating by extrinsic evidence.

157. Technical meaning.

§ 148. *Symbol*.—Oral evidence is competent to explain the meaning of a symbol used in a written contract, as in a stipulation to pay “at the rate of  $\frac{+}{100}$  dolls. per ton.”

Taylor *v.* Beavers, 4 *E. D. Smith* (N. Y.), 215 (admitting evidence to show that \$1.10 was in fact agreed on).

§ 149. *Absence of dollar mark*.—The absence of a dollar mark, and the fact that there is no other indication of the denomination of money indicated by a column of figures, than the column line or comma usually separating dollars and cents, does not impair the admissibility or effect of the account.

State *v.* Ring, 29 *Minn.*, 78.

S. P., in warrant for collection of taxes, 14 *Abb. N. C.*, 378, 381, and cas. cit. (aff'd it seems without opinion in 96 N. Y., 670).

*Contra*, *McClellan v. District of Columbia*, 17 *Wash. L. Rep.*, 222, and *cas. cit.*

§ 150. *Illegibility*.—Oral evidence is competent to dispel doubt as to what a word or character in an instrument was intended to be.

*Arthur v. Roberts*, 60 *Barb. (N. Y.)*, 580.

§ 151. *Blank*.—The omission to fill a blank with a number or other term essential to give meaning to the provision in which it occurs, creates a patent ambiguity which cannot be corrected by oral evidence.

*Vandevoort v. Dewey*, 42 *Hun (N. Y.)*, 68, 71.

*Compare*, *Camden Iron Works v. Fox*, 34 *Fed. Rep.*, 200.

§ 152. *Patent and latent*.—The rule forbidding extrinsic evidence to cure a patent ambiguity is not applicable except where the writing is required by a statute which the patent ambiguity prevents it from satisfying. In other cases the existence of a patent ambiguity invites extrinsic evidence.

For illustrations of the rule see *Mansfield v. N. Y. Central etc. R. R. Co.*, 102 *N. Y.*, 205; *s. c.*, 4 *Eastern Rep.*, 899; *Moore v. Meacham*, 10 *N. Y.*, 207; *Field v. Munson*, 47 *Id.*, 221.

§ 153. *Surrounding circumstances*.—Whenever the language used is susceptible of more than one interpretation, oral evidence of the surrounding circumstances existing when the contract was entered into, the situation of the parties and the subject matter of the instrument, is admissible.

*French v. Carhart*, 1 *N. Y.*, 96, 102, and cases cited (applying this rule to the construction of a deed of lands).

*Hinnemann v. Rosenback*, 39 *N. Y.*, 98 (holding that a stipulation in a building contract to pay a specified sum, in an order on a firm named, was explainable by oral evidence that the firm were dealers in building materials, and that it was not intended the order should be payable in cash).

*Manchester Paper Co. v. Moore*, 104 *N. Y.*, 680 (holding that the conversations of the parties in entering into the contract, and the characteristics of the business, and their relative needs and modes of action could be



proved, in order to show what the term "ruling market rates" meant, when it had been shown that there were two market rates. But a prior oral agreement could not be shown).

§ 154. *Usage of the business.*—To explain ambiguous language in a contract, evidence of the known and ordinary course of the particular business is competent;<sup>1</sup> but not evidence of how it was understood by other dealers with the same house, unless the party to the contract is shown to have been cognizant of such other transactions.<sup>2</sup>

<sup>1</sup> *Lyon v. Lennon*, 106 *Ind.*, 567; s. c., 7 *Northeast. Rep.*, 311.

<sup>2</sup> *Newhall v. Appleton*, 102 *N. Y.*, 133 (excluding other transactions for want of evidence of plaintiff's knowledge).

*Fabbri v. Phoenix Ins. Co.*, 55 *N. Y.*, 129 (admitting other transactions where the party's knowledge was shown).

§ 155. *Practical construction.*—When the meaning of a contract is ambiguous, extrinsic evidence, oral or written, is competent to show the practical construction put upon it by the parties by their acts under it.<sup>1</sup>

So of their practical construction of previous similar contracts in the same terms.<sup>2</sup>

<sup>1</sup> *French v. Carhart*, 1 *N. Y.*, 96, 102, and cases cited (receiving such evidence as to what was conveyed or reserved by a deed).

Approved in *Steinbach v. Stewart*, 11 *Wall. (U. S.)*, 566; s. c., 20 *Law. ed.*, 50 (receiving such evidence on the question whether a deed was intended as a grant or a license).

*S. P., Mayor etc. of N. Y. v. Starin*, 106 *N. Y.*, 1, and cases cited.

*Cavazos v. Trevino*, 6 *Wall. (U. S.)*, 773, 787, cited under BOUNDARY.

*Union Bank v. Hyde*, 6 *Wheat. (U. S.)*, 572; s. c., 5 *Law. ed.*, 333. (An indorser's stipulation that if his notes should not be protested, he would consider himself bound in the same manner as if legally protested, held to be ambiguous, and parol evidence was admissible to show that, by the understanding of both parties, and practical construction by one acquiesced in by the other, it dispensed with demand and notice on paper not strictly subject to "protest.")

<sup>2</sup> *Gray v. Gannon*, 4 *Hun (N. Y.)*, 57; s. c., 6 *N. Y. Supm. Ct. (T. & C.)*, 245.

§ 156. *Creating by extrinsic evidence.*—To create an ambiguity in the use of common and ordinary language in a written contract, so as to let in oral evidence, it is not enough to show circumstances known to one of the parties, but unknown to the other, which might have influenced the former in making the contract; but there must be proof of circumstances known to all of the parties to the agreement, and available to all, in selecting the language employed to express their meaning.

*Brady v. Cassidy*, 104 *N. Y.*, 147. (Use of words “manufactured stock on hand” in a bill of sale, not explainable by showing that a part of the apparent stock had been previously contracted to others.)

§ 157. *Technical meaning.*—It may be shown by oral evidence that a term has acquired a technical meaning in trade or art, different from its ordinary meaning, for the purpose of showing which meaning was intended.

*Pollen v. Le Roy*, 30 *N. Y.*, 549; aff'g 10 *Bosw. (N. Y.)*, 38.

*Compare Moran v. Prather*, 23 *Wall. (U. S.)*, 492; s.c., 23 *Law. ed.*, 121 (holding that the phrase “indebtedness due us by said steamboat” and the like, in a release and guaranty, could not be explained by oral evidence as meaning only debts enforceable *in rem.*), and *Agawam Bank v. Strever*, 18 *N. Y.*, 502 (allowing oral evidence to explain a memorandum that a note was left as security “for all liabilities incurred by D. to the A. Bank,” as including future liabilities).

AMOUNT.—[See also QUANTITY.]

§ 158. *Alternative computations by experts.*—To assist the jury or court in calculating the amount according to several theories of liability or hypotheses, it is proper to receive statements or plans of adjustment made by experts according to each of the several hypotheses or theories, not as evidence of the facts stated, but leaving the jury free to accept either or reject all.

*Home Insurance Co. v. Baltimore Warehouse Co.*, 93 *U. S.*, 527, 547.

APPLICATION OF PAYMENTS.—[See also PAYMENT.]

§ 159. Oral evidence.

§ 160. Direct testimony.

§ 159. *Oral evidence*.—Oral evidence is competent to show that it was agreed that a payment should be applied not in the order in which the items stood in the account, but in different manner.

Mack *v.* Adler, 22 *Fed. Rep.*, 570.

§ 190. *Direct testimony*.—The testimony of one of the parties to the transactions, that they looked over their accounts and agreed on a specified balance, and that they then agreed to apply it, or previously had agreed it should be applied to a cross demand, is testimony to an act done, constituting payment, and binds a subsequent assignee. It is not a mere present admission or declaration which cannot bind an assignee.

Holcomb *v.* Campbell, 42 *Hun* (N. Y.), 398.

Application of payment, how proved, in general, see *Abb. Tr. Ev.*, 265, 810, 811.

## APPRAISAL.

§ 161. *Competency*.—An official appraisal is not inadmissible merely because not made in the presence of the jury. It is in the nature of a public record; and the appraiser being called and testifying to its correctness, it may be received in evidence.

Buckley *v.* United States, 4 *How.* (U. S.), 251; s. c., 11 *Law. ed.*, 961.

Miller *v.* Long Island R. R. Co., 9 *Hun* (N. Y.), 194 (rev'd in 71 N. Y., 380, on other grounds).

If there were two appraisers both must be called. *Comm. v. Eastman*, 1 *Cush.* (Mass.), 189; s. c., 48 *Am. Dec.*, 596.

## APPROVAL.

§ 162. By judge.

§ 163. By corporation.

§ 162. *By judge*.—Approval of an instrument when required by statute, from a judge, is a judicial act,<sup>1</sup> but may be proved by the certificate of the clerk.<sup>2</sup>

If the law does not require approval to be indorsed, it may be proved by a recital in subsequent proceedings.<sup>3</sup>

<sup>1</sup>O'Reilly *v.* Edrington, 96 U. S., 724; 1 *Abb. New Prac. & Forms*, 478, 470.

<sup>2</sup>U. S. v. Evans, 1 *Crim. L. Mag.*, 600, 604; s. c., 12 *Chic. Leg. News*, 271.

S. P., Schermerhorn v. Talman, 14 *N. Y.*, 93 (oaths).

<sup>3</sup>Anderson v. Kanawha Coal Co., 12 *W. Va.*, 526.

§ 163. — *corporation*.—Approval by a person or corporation, of an instrument, although expressly required by law may be presumed, notwithstanding there was no record of such approval.

Bank of United States v. Dandridge, 12 *Wheat. (U. S.)*, 34; s. c., 6 *Law. ed.*, 552. (Approval of cashier's bond, by directors, presumed in the action of the corporation on the bond.)

ASSENT.—[The few leading cases here mentioned are chosen as giving in short compass convenient clue to numerous authorities sustaining the discriminations indicated.]

I.—ASSENT WITHOUT SIGNING. § 167. Direct testimony.

§ 164. Instrument delivered to be retained as evidence.

II.—NON-ASSENT NOTWITHSTANDING SIGNING.

165. —presumption, how far conclusive: burden of proof.

168. Neglect to read.

166. Instrument delivered but to be surrendered again.

169. Conditional delivery.

§ 164. *Instrument delivered to be retained as evidence*.—It is a presumption of law that a party who received an instrument in the ordinary course of business, as the evidence of his right in respect to the transaction in hand, was acquainted with its contents and assented to them.

Belger v. Dinsmore, 51 *N. Y.*, 166; s. c., 10 *Am. Rep.*, 575; rev'g 51 *Barb. (N. Y.)*, 69. (Express receipt with conditions.)

Grace v. Adams, 100 *Mass.*, 505 (express receipt or bill of lading, with conditions).

Steers v. Liverpool, N. Y. etc. S. S. Co., 59 *N. Y.*, 1; s. c., 15 *Am. Rep.*, 453, with note (receipt given for passage money).

Otherwise, where a previous agreement in different terms had been made, on the faith of which the transaction was had<sup>1</sup>; especially where the subsequent delivery of the instrument was to one not authorized to modify the agreement.

<sup>1</sup>Bostwick v. Baltimore & Ohio R. R. Co., 45 *N. Y.*, 712; Mobile & Montgomery R. R. Co. v. Jurey, 111 *U. S.*, 577.

<sup>2</sup> *Fillebrown v. Grand Trunk Ry. Co.*, 55 *Me.*, 462 (carrier's receipt).

Or where the act or omission of the party delivering it prevented the party receiving it from objecting.

*Palmer v. Hartford Fire Ins. Co.* (*Conn.*, 1887), 4 *New Eng. Rep.*; 470 (insurance policy on renewal, delivered to the party himself, without the original to compare it with).

Otherwise also of delivery to a casual messenger not authorized to make a contract, the course of business between the parties not requiring any writing.

*Buckland v. Adams Express Co.*, 97 *Mass.*, 124.

[*Compare Squire v. N. Y. Central*, 98 *Id.*, 239, holding that agent in charge of animals in transportation represented the absent owner and could bind them.]

Otherwise also of a paper not fully legible, as for instance, by reason of a stamp covering part of it.

*Perry v. Thompson*, 98 *Mass.*, 249.

Otherwise also of the delivery of a bill of lading if the goods had been already shipped, so that the party shipping, and receiving the bill of lading, could not have reclaimed the goods had he objected to the contents of the bill. *Guillaume v. General Transp. Co.*, 100 *N. Y.*, 491, and cases cited. (Here this rule was applied where the shipper had been informed that the ship would sail on the day before the bill of lading was received by him, and had no information to the contrary, although it did not sail until later.)

This presumption above stated applies to married women; and is conclusive in the absence of proof to the contrary or of fraud or undue influence.

*Smyth v. Munroe*, 84 *N. Y.*, 354; aff'g 19 *Hun* (*N. Y.*), 550.

§ 165. — *presumption how far conclusive: Burden of proof.*—A presumption that the party receiving such an instrument assented to its terms cannot be rebutted by mere proof that he did not read it; but in the absence of fraud, it must be shown that the circumstances were such that he would not have been bound to reject the instrument if he had read it.

*Germania Fire Ins. Co. v. Memphis etc. R. R. Co.*, 72 *N. Y.*, 90, 94; s. c., 28 *Am. Rep.*, 113; aff'g 7 *Hun* (*N. Y.*), 232.

§ 166. *Instrument delivered, but to be surrendered again.*—The receipt of an instrument for a temporary purpose, which is to be surrendered, such as a passage ticket,<sup>1</sup> or a letter of instructions for a third person, not the agent of

the party receiving it,<sup>2</sup> does not raise a presumption that he read it, and assented to its terms; but is a circumstance to be considered by the jury on that question.<sup>3</sup>

<sup>1</sup> *Baltimore & O. R. R. Co. v. Harris*, 12 *Wall. (U. S.)*, 65, 85, and *cas. cit.*; s. c., 20 *Law. ed.*, 364 (holding that the burden of showing that a passenger had knowledge of a memorandum on the face of his ticket, limiting the liability of the company, and assented to it, is on the company).

*S. P., Brown v. Eastern R. R. Co.*, 65 *Mass. (11 Cush.)*, 97 (memorandum on *back* of ticket. Approved in *Rackett v. Stickney*, 27 *Fed. Rep.*, 878).

*Malone v. Boston etc. R. R. Co.*, 78 *Mass. (12 Gray)*, 388 (similar memorandum on *back*, and the words "look on the back" printed on the face).

<sup>2</sup> *Rackett v. Stickney*, 27 *Fed. Rep.*, 818.

<sup>3</sup> *Brown v. Eastern R. R. Co.*, 65 *Mass. (11 Cush.)*, 97.

§ 167. *Direct testimony*.—When the giving of assent is directly in issue it is not competent for a party to testify in his own behalf that he never assented, this being the question for the jury.

*Stanton v. Crispell*, 9 *Hun (N. Y.)*, 502 (question was whether he ever assented to an alleged settlement).  
*Compare CONTRACT*, 9.

## II.—NON-ASSENT NOTWITHSTANDING SIGNING.

§ 168. *Neglect to read*.—The effect of signing by one who was able to read and understand cannot be defeated by showing that he neglected to do so, relying on the reading by another.

*Chapman v. Rose*, 56 *N. Y.*, 137. Confirmed in other States, 22 *Centr. L. J.*, 149.

As to the rule in case of illiterateness, see *Abb. Tr. Ev.*, 512; *Knarr v. Elgren*, (*Pa.*, 1887), 8 *Centr. Rep.*, 828; s. c., 9 *Atl. Rep.*, 875.

§ 169. *Conditional delivery*.—The effect of signing an obligation cannot be defeated by showing that the signer signed only on condition that another should also sign who has not done so, if there is nothing on the face of the paper indicating that another was to sign, and it is not shown that the obligee was informed of the condition, nor that there was anything which should have put him on inquiry.

*Dair v. United States*, 16 *Wall.* (*U. S.*), approved and followed in *Harris v. Regester*, (*Md.*, 1889).

*Bangs v. Bangs*, 41 *Hun* (*N. Y.*), 41, and *cas. cit.*

[*Contra* *People v. Bostwick*, 32 *N. Y.*, 445, which however is opposed, in *Quick v. Milligan*, 108 *Ind.*, 419; s. c., 6 *Western Rep.*, 883. with note, and questioned in *Russell v. Freer*, 56 *N. Y.*, 67.]

Otherwise if the instrument mentioned as an obligor the one not signing. *Fletcher v. Austin*, 51 *Vt.*, 447; s. c., 34 *Am. Dec.*, 698.

ASSIGNMENT.—[See also ASSENT, CONTRACT, OWNERSHIP, TITLE.]

§ 170. Necessity of proof.

171. Oral evidence.

172. — notwithstanding written evidence exists.

173. Form.

174. — by book-keeping.

175. — by substitution of party.

176. Description.

§ 177. Principal and collateral.

178. Qualifying the schedules.

179. Reservation.

180. Impeaching — by motive or purpose.

181. — by evidence of abandonment.

182. Defeasance.

§ 170. *Necessity of proof*.—Assignment of the cause of action must be proved if alleged,<sup>1</sup> but not necessarily proved to have been made in the manner alleged.<sup>2</sup>

<sup>1</sup> *Garrigue v. Loescher*, 3 *Bosw.* (*N. Y.*), 578.

<sup>2</sup> *Bowman v. Keleman*, 65 *N. Y.*, 598.

§ 171. *Oral evidence*.—An assignment of a debt resting only in account, may be made by words, without any writing.

*Risley v. Phenix Bank of N. Y.*, 83 *N. Y.*, 313, 333, and *cas. cit.*; s. c., with note, 38 *Am. Rep.*, 421.

*Contra*, *White v. Kilgore*, 77 *Me.*, 571; s. c., 3 *Eastern Rep.*, 364, contending on a review of authorities, that the doctrines of equity require a delivery.

As to the requirement of a writing by the statute of Frauds, see *Abb. Tr. Ev.*, 2, 3.

§ 172. — *notwithstanding written evidence exists*.—When the fact of an assignment is only collaterally involved, oral evidence is competent without producing or accounting for the writing, unless contents of the writing are to be proved.

*Elliott v. Dyche*, 80 *Ala.*, 376.

§ 173. *Form*.—No formal or express words are necessary to prove an assignment, especially where there is a delivery.

*First Natl. Bank v. Clark*, 42 *Hun* (*N. Y.*), 16, 19.

§ 174. — *by bookkeeping*.—Assignment of a fund or credit may be proved by entries in account books of the fund holder, coupled with other evidence showing the request or assent of the other party.

Coates v. First Nat. Bk. of Emporia, 91 N. Y., 20, 30.

§ 175. — *by substitution of party*.—The fact that the plaintiff has been substituted as such, proved by the order of substitution and papers on which it was made, is sufficient evidence of the assignment of the cause of action to him.

Lewin v. Johnson, 32 Hun, 408, 410.

S. P., Smith v. Zalinski, 94 N. Y., 519; aff'g 26 Hun (N. Y.), 225.

§ 176. *Description*.—Oral evidence is competent for the purpose of applying the description, even so far as to require the rejection of erroneous parts, if what is left is sufficient.

Mansfield v. N. Y. Central R. R. Co., 102 N. Y., 205, and cas. cit. (holding that for this purpose, a judgment recovered after the assignment was competent).

§ 177. *Principal and collateral*.—Assignment of principal obligation implies assignment of collateral incidents; but assignment of collateral does not imply assignment of the principal obligation;<sup>1</sup> unless there be delivery of the principal,<sup>2</sup> or some other evidence of intent to pass it.

Abb. Tr. Ev., 3.

Yates County Natl. Bank v. Baldwin, 43 Hun (N. Y.), 136.

§ 178. *Qualifying the schedules*.—Oral evidence is competent to show other assets as passing besides those mentioned in the inventory annexed to a general bill of sale or assignment;<sup>1</sup> but not to show that demands included in the general language of the instrument were not intended to pass.<sup>2</sup>

<sup>1</sup> Cram v. Union Bank, 1 Abb. Ct. App. Dec. (N. Y.), 461.

Compare Mims v. Armstrong, 31 Md., 87.

<sup>2</sup> Albright v. Voorhees, 36 Hun (N. Y.), 437.

§ 179. *Reservation*.—A remaining or contingent interest in the assignor is not competent to impeach an assignment



of the cause of action, but is competent for the purpose of showing bias in the assignor if he is called as a witness.

*Durgin v. Ireland*, 14 N. Y., 322; *Moore v. Viele*, 4 Wend. (N. Y.), 420.

§ 180. *Impeaching—by motive or purpose*.—Motive is not relevant; <sup>1</sup> but illegality of object may be. <sup>2</sup>

<sup>1</sup> *McBride v. Farmers' Bank*, 26 N. Y., 450; aff g 25 Barb. (N. Y.), 657.

*Petersen v. Chemical Bank*, 32 N. Y., 21.

*Gardner v. Barden*, 34 N. Y., 433.

*Westervelt v. Allcock*, 3 E. D. Smith (N. Y.), 243.

*Osborne v. Moss*, 7 Johns. (N. Y.), 161.

*Waterbury v. Westervelt*, 9 N. Y., 598.

<sup>1</sup> *Abb. New Pr. & F.* 515 (citing cases of assignment to affect jurisdiction.)

<sup>2</sup> *Mann v. Fairchild*, 3 Abb. Ct. App. Dec. (N. Y.), 152.

*Moses v. McDivitt*, 2 Abb. N. C., 47.

§ 181. — *by evidence of abandonment*.—A written assignment may be proved ineffectual by evidence that the consideration was never paid, and that by common consent of both parties the instrument never went into operation, and that by their practical construction the apparent assignor continued to be the owner.

*Railroad Co. v. Trimble*, 10 Wall. (U. S.), 367–383; 19 Law. ed., 948.

§ 182. *Defeasance*.—Oral evidence to show that a written assignment was merely as collateral security is not competent if the instrument contains special clauses stating a contrary intent.

*Marsh v. McNair*, 99 N. Y., 174, and cas. cit.

## AUTOPSY.

§ 183. One of several physicians.      § 184. Irregularity.

§ 183. *One of several physicians*.—One of several physicians who together conducted an autopsy may testify to a fact observed by another.

*People v. Willson*, 109 N. Y., 345.

§ 184. *Irregularity*.—A qualified expert may testify as

the results of an autopsy, made by him notwithstanding his failure to follow the directions of the statute.

Comm. v. Taylor, 132 Mass., 261.

## BAD CASE.

§ 185. *Tampering with evidence*.—Proof is admissible of an attempt to suborn false testimony, as constituting an admission that the case of the party so attempting is not well founded.

*Patterson's Railw. Acci. Law*, 423. For the same principle, see *Trial Brief for Civil Issues; Tampering*, p. 102, *Criminal Trial Brief*, §§

BELIEF.—[See also GOOD FAITH; INTENT; INDUCEMENT; MOTIVE.]

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| § 186. Belief as characterizing one's own act. | § 189. Relief at the time of the transaction. |
| 187. Cross examining.                          | 190. Reason for belief.                       |
| 188. Asking for impression.                    | 191. Qualifying words as to belief.           |

§ 186. *Belief as characterizing one's own act*.—Where the belief under which the witness did an act is material his testimony to his belief is competent.

McKown v. Hunter, 30 N. Y., 625 (belief in making charge now the subject of an action for malicious prosecution).

Bayliss v. Cockroft, 81 N. Y., 363, and cas. cit.; aff'g 8 N. Y. Weekly Dig., 153 (belief that certificate to business character of paper was true, as bearing on intent to evade usury law. But the court say the reception of such testimony is not encouraged).

S. P., Hamilton v. People, 57 Barb. (N. Y.), 625; Goodman v. Stroheim, 36 N. Y. Super. Ct. (J. & S.), 216; Farnam v. Feeley, 56 N. Y., 451.

§ 187. *Cross-examining*.—One who has testified as to his own belief at a given time may be cross-examined as to subsequent declarations of his state of mind on the subject.

Livingston v. Keech, 34 N. Y. Super. Ct. (J. & S.), 547, 553 (holding thus of a party who had testified on his own behalf).

S. P., As to hostile witness, Comm. v. Moinehan, (*below cited*).

§ 188. *Asking for impression*.—A hostile witness who

will not answer positively as to a fact resting in the observation of *minutiæ*, may be asked if he “thinks” the fact was so.<sup>1</sup>

<sup>1</sup> *Comm. v. Moinehan*, 140 *Mass.* 463; *s. c.*, 5 *Northeastern Rep.*, 259 (witness testified he did not know whether what he drank was lager beer or not; on cross, he said it was weak beer and had an intoxicating effect. *Held*, no error to allow on redirect the question if he did not think it was lager beer; and whether he had not elsewhere testified that he thought it was.

HOLMES, J., said :

“The application of a class name to an object perceived by the senses is generally the expression of an inference, and testimony would be impossible if such inferences could not be stated. If the witness had said that it was lager beer, his testimony would only have meant that he confidently thought, or inferred from the qualities directly perceived by him, that the substance had the other qualities denoted by the name.”

*Compare*, however, *People v. Williams*, 29 *Hun (N. Y.)*, 520, 524, holding it error, to allow a witness who could not swear who it was he saw, to be asked what was his impression and who he thought it was. Judgment therefore reversed.

§ 189. *Belief at the time of the transaction.*—In some cases the belief or impression produced on a witness' mind at the time of the occurrences to which he speaks, is admitted as giving the necessary and proper color to his testimony to the occurrence;—as in case of circumstantial evidence or opinion evidence.

See for instance, *Fraser v. Fraser*, 5 *Notes of Ecc. Cas.*, 11, 34; *Faussett v. Faussett*, 7 *Notes of Ecc. & M. Cas.*, 88; *Davidson v. Davidson*, 1 *Dean & S. Ecc.*, 132; *s. c.*, 2 *Jur. N. S.*, 577.

§ 190. *Reason for belief.*—Where testimony to a fact resting in inference is competent because resulting from observation of *minutiæ* not easily describable with the same effect, the witness may state the reasons for his belief.

*Griffin v. Brown*, 19 *Mass. (2 Pick.)*, 304, 309. (Witness having testified that a person lived extravagantly, may state the reasons for the belief.)

§ 191. *Qualifying words as to belief.*—An answer of a witness is not to be struck out because he qualifies his statement of a fact by such cautious expressions as “I should judge,” “I think.”

*Hallahan v. N. Y. Lake Erie & W. R. R. Co.*, 102 *N. Y.*, 194; *s. c.*, 2 *Centr. Rep.*, 924, 4 *Eastern Rep.*, 914. (A witness being asked to describe the position of a passenger's elbow, said, "his elbow was resting on the sill, and I should judge that it could not project out of the window by the position he held in the car . . . It was probably on a level with the outside of the car [window sill?] my opinion was, from the position, that it was inside." *Held* not error to refuse to strike out the parts thus qualified.)

*Bradley v. Second Ave. R. R. Co.*, 8 *Daly (N. Y.)*, 289 ("he seemed to me drunk, but I could not say positively that he was," sufficient to go to the jury).

Otherwise, if the impression of the witness is merely another name for his opinion, in which case it is not competent unless as opinion evidence. *Guiterman v. Liverpool S.S. Co.*, 9 *Daly (N. Y.)*, 119, 125 (rev'd without impugning this rule in 83 *N. Y.*, 358.)

The words "I think they were worth \$100," are not alone sufficient to establish the value of services. *Harrison v. Ayers*, 18 *Hun (N. Y.)*, 336.

Belief of a witness, however confident, not evidence, without recollection. *Butler v. Benson*, 1 *Barb. (N. Y.)*, 526, 537.

BIAS.—[As to CONVERSATIONS and ADMISSIONS, see those titles.]

§ 192. Cross-examining on details.    § 194. Repelling.  
193. Calling witness' attention.

§ 192. *Cross-examining on details.*—The fact that a witness under cross-examination admits bias, does not impair the right of the cross-examiner to call out details and particular facts manifesting it.

*People v. Penhollow*, 42 *Hun. (N. Y.)*, 103, and *cas. cit.*

§ 193. *Calling witness' attention.*—The rule that before declarations of a witness (other than a party) can be proved to impeach his testimony, his attention must be called to time, place, etc., although it applies to declarations expressing bias, sought to be proved not to contradict but only to discredit,<sup>1</sup> does not preclude proving the fact of a quarrel, and sufficient in the discretion of the court to indicate the extent of the difficulty and consequent ill-feeling.<sup>2</sup>

<sup>1</sup> *Edwards v. Sullivan*, 8 *Ired. (N. C.) L.*, 302 (reversing for error in not requiring it).

*Baker v. Joseph*, 16 *Cal.*, 173.

S. P., *Queen's Case*, 2 *Brod v Bing*, 284, 311. (The leading case. *Held*, that acts of subornation of perjury could not be proved against the witness, his attention not having been called to them on cross-examination.)

*But compare* *Day v. Stickney*, 14 *Allen (Mass.)*, 255, to the effect that hostility in the very matter in issue may be proved, without having called attention to it.

<sup>2</sup> *Ellsworth v. Potter*, 41 *Vt.*, 685.

*Pierce v. Gilson*, 9 *Id.*, 216 (holding it error to exclude).

§ 194. *Repelling.*—To repel an imputation of bias in favor of the party calling the witness, arising from relationship, the party may show that he and his witness have been at variance.

*Clapp v. Wilson*, 5 *Den. (N. Y.)*, 285.

BIRTH.—[As to AGE see that title.]

§ 195. Premature or still birth.

196. Hearsay

§ 197. Date of birth.

§ 195. *Premature or still birth.*—

*Young v. Makepeace*, 103 *Mass.*, 50.

*Daegling v. State*, 56 *Wisc.*, 586; s. c., 14 *Northwestern Rep.*, 593.

*Wallace v. State*, 10 *Tex. App.*, 255.

§ 196. *Hearsay.*—Place of birth not a fact of pedigree to be proved by declaration of a person since deceased.

*Wilmington v. Burlington*, 4 *Pick. (Mass.)*, 174 (settlement of pauper).

For the general rule, see *Abb. Tr. Ev.*, 71, 98, and § 86, AGE, in this vol.

§ 197. *Date of Birth.*—A church record or certificate of baptism, though it may be evidence that the birth occurred previously,<sup>1</sup> is not evidence of the date of the birth as stated therein; unless it can be made competent by proof of the declaration of the parent or other qualified person, on the faith of which it was made.<sup>2</sup>

<sup>1</sup> Re *Wintle L. R.* 9 *Eq.*, 373.

And see *Whitcher v. McLaughlin*, 115 *Mass.*, 167.

Compare *Bradford v. Bradford*, 51 *N. Y.*, 669.

<sup>2</sup> *Whien v. Law*, 3 *Stark.*, 63.

BLOOD.—[And see IDENTITY, and QUALITY.]

§ 198. *Direct testimony*.—Any witness who is able from observation to do so, may testify whether a spot or stain was blood.<sup>1</sup>

And the clothing may be submitted to the jury to say if the stains on it are new or old, and, if old, dating back a long time.<sup>2</sup>

Whether it was *human, or animal blood*, is a question for experts only.<sup>3</sup>

<sup>1</sup> *People v. Greenfield*, 85 *N. Y.*, 75, 83; *People v. Deacons*, 109 *N. Y.*, 374, and *cas. cit.*

*S. P.*, *Barbour v. Comm.*, 80 *Va.*, 287; *s. c.*, 9 *Va. L. J.*, 309.

<sup>2</sup> *Kings v. N. Y. Central R. R. Co.*, 72 *N. Y.*, 607 (*dictum*).

<sup>3</sup> *Dicta* in same cases. Experts may testify which it was. *Linsday v. People*, 63 *N. Y.*, 143; *aff'g 5 Hun (N. Y.)*, 104; *s. c.*, more fully, 67 *Barb. (N. Y.)*, 548.

As to distinguishing them, see 10 *Central L. J.*, 183.

On *expert* testimony and the microscopic examination of blood, see 19 *Am. Law. Reg.*, 529, 593.

## BOUNDARIES.

§ 199. *How proved* in general.

*Abb. Tr. Ev.*, 700. Declarations of deceased persons, *Clement v. Packer*, 125 *U. S.*, 309, 321; *s. c.*, 31 *Law. ed.*, 721; 8 *Sup. Ct. Rep.*, 907; *Hunnicut v. Peyton*, 102 *U. S.*, 333; *s. c.*, 26 *Law. ed.*, 113. Declarations of adjoining owner. *Long v. Colton*, 116 *Mass.*, 414; *Bethea v. Byrd*, 95 *N. C.*, 309.

See also PLACE.

## BREED.

§ 200. Expert may testify to.

§ 201. Published herd book.

§ 200. *Expert may testify to*; <sup>1</sup> but his certificate is only hearsay.<sup>2</sup>

<sup>1</sup> *Harris v. Panama R. R. Co.*, 36 *N. Y. Super. Ct. (J. & S.)*, 373, 378 (*aff'd*, without discussing this point, in 58 *N. Y.*, 660).

<sup>2</sup> *Hamilton v. Wabash etc. R. Co.*, 21 *Mo. App.*, 152; *s. c.*, 3 *Western Rep.*, 789.

§ 201.—*A published herd book* is not competent alone,<sup>1</sup>

but may be made so by testimony that it is generally received and used by experts as a standard authority.<sup>2</sup>

<sup>1</sup> *Crawford v. Williams*, 48 *Iowa*, 249; s. c., cited in 59 *Am. Dec.*, 186, *note*.

<sup>2</sup> *Kuhns v. Chicago etc. R. Co.* 65 *Iowa*, 528; s. c., 22 *Northwest. Rep.*, 661.

*Townsley v. Missouri Pac. Ry. Co.* 89 *Mo.*, 31; s. c., 1 *Southwestern Rep.*, 15, *note*.

## BUSINESS.

§ 202. Nature and usual course.

203. Scope of particular trade.

204. Practice of particular house.

§ 205. Contradiction of ground of beliefs.

206. Who proprietor.

§ 202. *Nature and usual course.*—The court may take judicial notice of the nature and usual course of business of banks<sup>1</sup> and railroad companies.<sup>2</sup> So also of the nature and junction of such established and well known instruments of commerce as mercantile agencies.<sup>3</sup>

So also of the usual course of trade to make advances on produce by use of bills of lading<sup>4</sup> and the practice of putting small packages adapted for retail trade, into larger packages for wholesale trade.<sup>5</sup>

<sup>1</sup> *Merchants' Nat. Bk. of Whitehall v. Hall*, 83 *N. Y.*, 338; s. c., 38 *Am. Rep.*, 434, *aff'g* 18 *Hun (N. Y.)*, 176.

*Yerkes v. National Bk. of Port Jervis*, 69 *N. Y.*, 383; s. c., 25 *Am. Rep.*, 208, and 2 *Browne's Nat. Bk. Cas.*, 296.

<sup>2</sup> *Isaacson v. N. Y. Central R. R. Co.*, 94 *N. Y.*, 278; *rev'g* 25 *Hun (N. Y.)*, 350 (practice of checking baggage through over several connecting lines).

*Lane v. N. Y. Lake Erie & W. R. R. Co.*, 23 *N. Y. Weekly Dig.*, 267 (practice of employing trackmen to inspect the line).

<sup>3</sup> *Eaton, Cole & B. Co. v. Avery*, 83 *N. Y.*, 31; s. c., 38 *Am. Rep.*, 389; *aff'g* 18 *Hun (N. Y.)*, 44. Followed in *Holmes v. Harrington (Mo. App., 1886)*, 3 *Western Rep.*, 296.

<sup>4</sup> *Gibson v. Stevens*, 8 *How. (U. S.)*, 384.

<sup>5</sup> *King v. Gallun*, 109 *U. S.*, 99.

§ 203. *Scope of particular trade.*—To prove the scope of a particular trade, neither direct testimony of a witness,<sup>1</sup> nor the opinion of a witness is competent,<sup>2</sup> but it must be proved as a fact, by evidence of usage,<sup>3</sup> etc.

<sup>1</sup> *Steinbach v. Lafayette Fire Ins. Co.*, 54 *N. Y.*, 90.

<sup>2</sup> *Home Ins. Co. v. Weide*, 11 *Wall. (U. S.)*, 438.

<sup>3</sup> *Steinbach v. Lafayette Fire Ins. Co. (above cited)*.

§ 204. *Practice of particular house.*—Evidence of the uniform practice of a particular house is not competent for the purpose of showing what was done in a particular transaction, if the transaction should have been entered in their books and the books are not produced or accounted for.<sup>1</sup> Otherwise when such evidence is offered in corroboration of collateral testimony.<sup>2</sup>

<sup>1</sup> *Bank of Utica v. Hillard*, 5 *Cow. (N. Y.)*, 153.

<sup>2</sup> *Knickerbocker Life Ins. Co. v. Pendleton*, 115 *U. S.*, 339, 345.

§ 205. *Contradiction by contradicting ground of belief.*—After a witness has testified that the ground of his belief of a fact he has sworn to is the existence of a uniform practice or usage to that effect, it is competent, for the purpose of contradicting the existence of such practice or usage to show that at specific times other than that in issue it was not pursued.

*Wentworth v. Eastern R. R. Co.*, 143 *Mass.*, 248; s. c., 3 *New England Rep'r*, 355

§ 206. *Who proprietor.*—Competent to prove inscription on sign, card, label, etc.

*Abb. Tr. Ev.*, 774 (who appeared to be in charge.)

*Comm. v. Smith*, 143 *Mass.*, 169; s. c., 3 *New England Rep.*, 305 (and who assumed to be proprietor.)

*State v. Skinner*, 34 *Kan.*, 256; s. c., 8 *Pacific Rep.*, 420.

CAPACITY.—[As to *personal* capacity see ABILITY, and CHARACTER.]

§ 207. Qualification of witness.      § 209. Time of knowledge.

208. Comparison.

§ 207. *Qualification of witness.*—A witness who has had actual experience of the capacity of a machine<sup>1</sup> or structure,<sup>2</sup> if not such as in ordinary use in common life,<sup>3</sup> may testify what is its capacity.

<sup>1</sup> *Bemis v. Cent. Vt. R. R. Co.*, 58 *Vt.*, 636; s. c., 2 *New Engl. Rep.*, 187 (holding expert evidence to prove that a crane was of sufficient capacity and repair, competent).



The experts were a carpenter who had repaired it, and the roadmaster and division superintendent.—*Held*, that their qualification as expert was in the discretion of the court.

<sup>2</sup> *Paddock v. Bartlett*, 68 *Iowa*, 16. (Action for price of building packing house of specified capacity. Witnesses whose opinions were based upon observation and experience in working in a pork house are competent to testify as to the capacity of the house for packing pork.)

*Frey v. Lowden*, 70 *Cal.*, 550, 552 (capacity of ditch for carrying water to mine, a question of fact, to which an expert in mining and measuring and selling water may testify, although not scientifically trained in measurements).

That opinion evidence is competent as to carrying capacity of a ship with safety, see *Ogden v. Parsons*, 23 *How. (U. S.)*, 167; s. c., 16 *Law. ed.*, 410.

<sup>3</sup> According to *Bemis v. Central Vermont R. R. Co.* (*above cited*), the propriety of opinions as to the capacity of machine depends on its being a peculiar or unusual one, not such as is in ordinary use. Hence opinions as to the safe capacity of a railroad derrick were held incompetent.

§ 208. *Comparison with similar machine.*—To show the capacity of a patented machine, a witness who has used one of the same kind, manufacture and number, may testify to its capacity although he never saw the one in suit.

*Sprout v. Newton*, 48 *Hun (N. Y.)*, 209. (Alleged breach of warranty of capacity of evaporator, as defense to action for price. *Held*, that plaintiff might prove capacity of an exactly similar one. The court say this tends to show capacity, assuming that the machine was perfect in all its parts. Any defects impairing its power, would be the subject of proof.)

*S. P., Briery v. Davol Mills*, 128 *Mass.*, 291 (admitting testimony to the working of one substantially similar).

In *Nat'l Bank & Loan Co. v. Dunn*, 106 *Ind.*, 110; s. c., 3 *Western Rep.*, 713, a similar ruling was sustained on the ground that it was an incidental and inferential point; distinguishing *McCormick, etc. Co. v. Gray*, 100 *Ind.*, 285, where it was held error to allow a witness to testify how a machine worked, based on comparison with other machines not produced.

§ 209. *Time of knowledge.*—The fact that the witness' examination was long after the time to which the evidence

should be directed, does not render his testimony incompetent.

Nat. Bank & Loan Co. *v.* Dunn, 106 *Ind.*, 110; s. c., 3 *Western Rep.*, 713. (Two years,—*held*, not too long, where the testimony related to the structure and general character.)

Burns *v.* Welch, 8 *Yerger (Tenn.)*, 117. (Testimony of witness as to capacity of saw mill, founded upon knowledge acquired four years previously, competent.)

CARE.—[See also CONDITION, DUTY, and NEGLIGENCE. As to character for care or skill, see CHARACTER.]

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| § 210. Care and skill, in matter of special knowledge. | § 215. Conduct of the witness.          |
| 211. — in matter of common life.                       | 216. Observation dependent on minutiae. |
| 212. Form of question.                                 | 217. General habit.                     |
| 213. What might have been done.                        | 218. Taking advice.                     |
| 214. Whether it might have been avoided.               | 219. Precautions.                       |

§ 210. *Care and skill, in matter of special knowledge.*  
—On any subject not within the common knowledge and experience of men of common education, in the ordinary walks of life, an expert witness may be asked whether or not a supposed act would be careful or prudent, under specified circumstances, though that is to be the very question for the jury if they find the facts as supposed.

Transportation Line *v.* Hope, 95 *U. S.*, 297, 298, and *cas. cit.* (Action for negligent loss in towing. Not error to ask pilot and tugboat captain of many years' experience, whether it would be safe and prudent to tow three abreast in wide waters in p high wind.)

Carpenter *v.* Eastern Transp. Co., 71 *N. Y.*, 574, 580, *aff'g* 67 *Barb. (N. Y.)*, 570. *Dictum*, that witness may be asked whether specified conduct in towing is seaman-like and proper.

S. P., CONSTRUCTION.

Ayres *v.* Water Comm'rs of Binghamton, 22 *Hun (N. Y.)*, 297 (holding it competent to ask what would have been a proper manner of filling a street excavation, but not as to how you would do it).

§ 211. *In matter of common life.*—On a subject within the common knowledge and experience of men in the ordinary walks of life, and of common education, a witness cannot be asked whether or not the act was careful or pru-

dent,<sup>1</sup> even though he be an expert in the estimation of risks caused by such acts.<sup>2</sup>

<sup>1</sup> *White v. Ballou*, 8 *Allen (Mass.)*, 408. (Action for negligently setting fire. Question whether putting wood to dry upon the top of an arch with fire in it, was safe and prudent, properly excluded.)

*Stowe v. Bishop*, 58 *Vt.*, 498; s. c., 2 *New Eng. Rep.*, 109. (Action for injury to horse by leaving him where he was frightened and ran. *Held*, proper to exclude question whether it was prudent or careful to leave such a horse at such a place.)

[But the witness might be asked for facts, as whether he observed anything rendering it an unfit place.]

*Balt. & O. R. R. Co. v. Schultz*, 43 *Ohio*, 270; s. c., 1 *Western Rep.*, 70, 73 (sufficiency of fence).

*Fraser v. Tupper*, 29 *Vt.*, 409 (opinions as to suitability of a day for setting fires, excluded).

*Higgins v. Dewey*, 107 *Mass.*, 494 (opinion that there was no probability such fire would spread, excluded).

The question as to whether property carried upon the deck of a canal-boat is properly covered so as to protect it from rain, is not properly a subject of expert testimony; the facts should be presented to the jury and the question left to them for determination. *Schwinger v. Raymond*, 105 *N. Y.*, 648.

*Milwaukee etc. R. R. Co. v. Kellogg*, 94 *U. S.*, 469, 475.

(Action for negligently causing fire. Not error to exclude question to insurance expert, whether owing to the distance between the buildings, one would be considered an exposure to the other, increasing the risk.)

*S. P., Mulry v. Mohawk Valley Ins. Co.*, 5 *Gray (Mass.)*, 541.

See the contrary doctrine advocated in 19 *Am. Law. Rev.*, 701.

And see *Hill v. Penobscot etc. R. R. Co.*, 55 *Me.*, 438; approved in *Stowe v. Bishop*, 58 *Vt.*, 498; s. c., 2 *New Eng. Rep.*, 109.

§ 212. *Form of question.*—To call for the opinion of a witness on the care, propriety or prudence of an act,<sup>1</sup> he cannot be asked his opinion as to what was or was not done as matter of fact, as for instance; whether the act or omission proved was proper or prudent; or whether the person whose conduct is in question omitted or neglected to do anything which he might have done.<sup>2</sup> 23 *Eng. R. R. C.*; 30 *Eng. R. R. C.*

<sup>1</sup> *Bemis v. Central Vermont R. R. Co.*, 58 *Vt.*, 636; s. c., 5 *Eastern Rep.*, 251; 3 *Atlantic Rep.*, 531 (prudence of using a railroad crane or derrick for a specified weight of stone).

In *Price v. Powell*, 3 *N. Y.*, 322, 326, action against carrier by sea for injury to marble; a seafaring man for forty years, habituated to carrying marble, and familiar with the proper mode of stowing it in sea-going vessels, was allowed to be asked if in his opinion the marble was properly stowed; but this question under the present stricter practice might be objectionable as assuming that the mode of stowage was conclusively proved.

<sup>2</sup> *Carpenter v. Eastern Transp. Co.*, 71 *N. Y.*, 574, 580; aff'g 67 *Barb. (N. Y.)*, 570.

[Distinguished in *Brink v. Hanover Fire Ins. Co.*, 80 *N. Y.*, 108, 116, where it was held proper to ask witness if he did all he could.]

*Schwander v. Birge*, 46 *Hun (N. Y.)*, 66, and cas. cit. (omission to provide building with fire escape).

§ 213. *What might have been done.*—An expert witness who has testified to the facts, may be asked whether he knew of anything that the person might have done.

*Carpenter v. Eastern Transp. Co.*, 71 *N. Y.*, 574, 580; aff'g 67 *Barb. (N. Y.)*, 570 (dictum).

S. P., CONDITION.

*Freeman v. Travelers Ins. Co.*, 144 *Mass.*, 572; s. c., 4 *New Engl. Rep.*, 621; 12 *Northeast. Rep.*, 372 (train might have been stopped sooner).

§ 214. *Whether it might have been avoided.*—By a proper hypothetical question assuming the facts claimed to be in evidence, an expert witness may be asked whether with proper skill and care the injury would have resulted.

*Boldt v. Murray*, 2 *N. Y. State Rep.*, 232. BRADLEY, J. (action for surgical malpractice).

§ 215. *Conduct of the witness.*—Where a witness cannot be asked whether a thing was done as soon as possible, he may yet be asked if he himself did all he could to get it done as soon as possible, even though this involve the very question for the jury.

*Brink v. Hanover Fire Ins. Co.*, 80 *N. Y.*, 108, 116. [The same principle applies to other elements in care and diligence, see ABILITY.]

Otherwise of the question whether another person did or omitted anything which he might have done, etc.

§ 216. *Observation dependent on minutiae.*—The principle that if the fact in question is one the observer's knowledge

of which is necessarily derived from minutiae which cannot be described with the same effect as observed unless the impression of the witness is given, the witness may state the fact directly as he apprehended it, leaving the minutiae to be called out on cross-examination,<sup>1</sup>—applies to the case of any complex mechanical operation. An expert who observed the work may be asked whether it was carefully and properly done.<sup>2</sup> And an expert who did not see it, may state his opinion upon an hypothetical question,<sup>3</sup> even though it be the very question for the jury.<sup>4</sup>

<sup>1</sup> For other illustrations see §§ 258, etc.

S. P., *Curtis v. Gano*, 26 N. Y., 426; *Ward v. Kilpatrick*, 85 *Id.*, 413 (cabinet maker may be asked if work was a good job and well done).

*Schwander v. Birge*, 46 *Hun* (N. Y.), 66 (citing cases, and holding that opinions are competent on subjects of which observation and experience have given the opportunity and means of knowledge, which exists in reasons rather than descriptive facts, and therefore cannot be intelligently communicated to others not familiar with the subject so as to possess them with a full understanding of it).

<sup>2</sup> *Eureka Co. v. Bass*, 81 *Ala.*, 200 (as to blasting, proper to ask if the holes were "properly charged" before the fuse was ignited, that being a collective fact, not a mere opinion; but not to ask "Within what time would it be safe to return to a hole charged with a dynamite cartridge which had failed to explode").

<sup>3</sup> In *Guiterman v. Liverpool etc. S. S. Co.*, 83 N. Y., 358, the judgment in 9 *Daly* (N. Y.), 119, was reversed for error in allowing the question without stating to the witness the facts to be assumed. The question here was one of good seamanship.

<sup>4</sup> *Transportation Line v. Hope*, 95 U. S., 297, 298.

§ 217. *General habit.*—On the question of care or negligence in a particular matter, evidence of the general habit of a person is not competent,<sup>1</sup> but if such evidence has been received one has a right to contradict it by similar evidence to the contrary.<sup>2</sup>

<sup>1</sup> *Chase v. Maine Cent. R. Co.*, 32 *Alb. L. J.*, 139, and *cas. cit.*)

*Baltimore & O. R. Co. v. Colvin*, 118 *Pa.*, 230; *s. c.*, 10 *Central Rep.*, 583; 12 *Atlantic Rep.*, 337; 20 *W. N. C.*, 531 (*dictum*, the point held being that to receive evidence of reputation was reversible error).

[Otherwise in a conflict of testimony as to whether the act was done].

S. P., *Atchison, T. & S. F. R. Co. v. Gants*, 38 *Kan.*, 608; s. c., 17 *Pacific Rep.*, 54 (holding that to disprove use of bad language, evidence of contrary habit is not competent).

<sup>2</sup> *Shindler v. Norwood*, 3 *Alb. L. J. (N. Y. C. P.)*, 50 (reversing judgment for refusal to receive it).

§ 218. *Taking advice*.—Evidence that, before acting in a matter alleged to be negligence, the party took competent and skillful advice and acted in conformity with it, is competent, as tending to show caution and good faith.

*Winn v. Abeles*, 35 *Kan.*, 85, s. c., 10 *Pacific Rep.*, 443, 448.

*Terre Haute v. Hudnut*, 112 *Ind.*, 542; s. c., 11 *Western Rep.*, 333; 13 *Northeast. Rep.*, 686.

§ 219. *Precautions*.—A party charged with negligence may show that he employed extraordinary care and circumspection; <sup>1</sup> and for this purpose it is proper to ask a qualified witness whether it was usual to provide such safeguards as are shown to have been provided in the case at bar.<sup>2</sup>

<sup>1</sup> *Losee v. Buchanan*, 51 *N. Y.*, 476; s. c., 10 *Am. Rep.*, 623, rev'g 61 *Barb. (N. Y.)*, 86. Distinguished in *Mullen v. St. John*, 57 *N. Y.*, 567, 572; s. c., 15 *Am. Rep.*, 530 (boiler explosion: competent to show that the boiler was purchased of reputable manufacturers, as tending to justify use).

<sup>2</sup> *Hart v. Hudson River Bridge Co.*, 84 *N. Y.*, 56, 60 (not error to allow defendant charged with negligence in leaving gate on drawbridge open, to show by an expert that it was not customary to have gates of any kind on such bridges so far as he knew).

CAUSE.—[See also CARE; CONDITION; EFFECT; INDUCEMENT, and MOTIVE.]

- |   |   |
|---|---|
| § 220. Cause of wound or death.                   | § 229. Experiments to corroborate opinion.      |
| 221. Form of question.                            | 230. Suggestion of another cause.               |
| 222. Common inference,—conjecture.                | 331. — cross-examination.                       |
| 223. — probable position.                         | 332. Rebutting suggestion of other cause.       |
| 224. — exhibiting instrument.                     | 233. Cause unknown to expert.                   |
| 225. — cause of suicide.                          | 234. — presumption of continuance.              |
| 226. Cause—in matter involving special knowledge. | 235. Declarations as part of <i>res gestæ</i> . |
| 227. Direction of blow, force or fluid.           |   |
| 228. What would have been.                        |   |

§ 220. *Cause of wound or death.*—An expert<sup>1</sup> who has examined an injured person, or the body of one deceased, may state his opinion as to what was the cause of a wound or other injury thereon,<sup>2</sup> or the cause of death.<sup>3</sup>

And an expert who has not made an examination may state his opinion on an hypothetical question.<sup>4</sup>

The same principle applies to injuries, etc., to animals.<sup>5</sup>

But a question for this purpose must not propound an hypothesis for which there is no basis of fact.<sup>6</sup>

<sup>1</sup> The opinion of one not an expert is not competent.

*Harris v. Panama R. R. Co.*, 3 *Bosw. (N. Y.)*, 7 (error to allow the question whether a wound which the witness saw inflicted on a horse, was sufficient to cause death; because the witness was not proved to be skilled as to such wounds, nor to have treated such injuries).

Compare *People v. Sullivan (Cal., 1885)*, 8 *Pacific Rep.*, 520 (to effect that a witness experienced with wounds, though not a professional expert, may testify whether a wound was caused by a sharp or dull instrument).

<sup>2</sup> *Turner v. City of Newburgh*, 109 *N. Y.*, 301 (civil case).

*People v. Willson*, 109 *N. Y.*, 345 (criminal case).

So medical experts may testify as to the power of resistance of the skull, and the force requisite to break it. *Kennedy v. People*, 39 *N. Y.*, 245; s. c., 5 *Abb. Pr. N. S. (N. Y.)*, 147.

*Comm. v. Piper*, 120 *Mass.*, 185 (whether all the injuries to deceased's head could have resulted from the same blow).

<sup>3</sup> *Eggler v. People*, 56 *N. Y.*, 642; aff'g 3 *N. Y. Supm. Ct. (T. & C.)*, 796 (which of two wounds, either by itself necessarily fatal, actually caused death. Opinion not reported).

*State v. Clark*, 15 *So. Car.* 403 (whether body found on track was dead before train passed).

*People v. Baker*, 60 *Mich.*, 277; s. c., 27 *Northwest. Rep.*, 539 (whether death of one found in the water was caused by drowning or other means).

*People v. Foley (Mich., 1887)* 7 *Western Rep.*, 345.

(Indictment of father for murder of infant child. Not error to allow hypothetical question to physician, as to what caused its death, for the purpose of showing that violence was the cause.)

He can be asked what might have caused it, but not what did cause it. *People v. Hare*, 57 *Mich.*, 505; s. c., 24 *Northwestern Rep.*, 843, 846.

<sup>5</sup> *Goodrich v. People*, 19 *N. Y.*, 574, 577 (Supreme Ct. aff'd by Ct. of Appeals without questioning this point).

<sup>6</sup> *People v. Rogers*, 13 *Abb. Pr.*, *N. S. (N. Y.)*, 370 (proper to ask if wound could have been produced by the club, use of which was in evidence; but not proper to ask if it might have been produced by a stone thrown).

§ 221. — *form of question*.—The question may be either as to the cause of such an injury, or conversely what would be the effect on the body of such a force or blow.

*Williams v. State*, 64 *Md.*, 384; s. c., 1 *Central Rep.*, 704.

§ 222: — *common inference,—conjecture*.—An opinion which is matter of common inference not requiring skill<sup>1</sup> or is obviously matter of conjecture upon the facts, as whether a mortally wounded man could have sufficient strength left to give a blow which would have a certain effect,<sup>2</sup> should be excluded.

<sup>1</sup> *People v. Bodine*, 1 *Den. (N. Y.)*, 281, 311. (Here a corpse was found partially burned, and parts covered with loose clothing were not burned. *Held*, that an expert's inference that the person must have been dead before the fire broke out, as otherwise the covering would have been disturbed, was inadmissible.) The trial of this case is reported in 1 *Edm. Sel. Cas.*, 37.

<sup>2</sup> COWEN, J., in *People v. Ector*, 19 *Wend. (N. Y.)*, 569, 577. citing *Selfridge's Trial*, 2 *Ed.*, 60; and holding the matter a question for the jury. So also of the question whether in a certain relative position and in a particular manner or by a particular motion certain muscular strength could inflict a specified wound. Citing 5 *City H. Rec.*, 5, 25, 26.

So also of whether a fracture of the skull, the body being found six months after death, was old or recent. *Linsday v. People*, 63 *N. Y.*, 143; aff'g 5 *Hun (N. Y.)*, 104; s. c., more fully, 67 *Barb. (N. Y.)*, 548.

§ 223. *Probable position*.—The questions what position a body was in when the blow to which a wound is attributed was probably struck,<sup>1</sup> or whether such a blow could have been struck when the persons concerned were in specified relative positions,<sup>2</sup> do not involve science or skill and are not proper subjects for opinion evidence.

<sup>1</sup> *Kennedy v. People*, 39 *N. Y.*, 245; s. c., 5 *Abb. Pr.*, *N. S. (N. Y.)*, 147.



At least until evidence has been given as to the kind of weapon used. *Trial of Lindsay* (Syracuse, 1874); conviction affirmed, without discussing this point, in 63 N. Y., 143; aff'g 5 Hun (N. Y.), 104; s. c., more fully 67 Barb. (N. Y.), 548.

<sup>2</sup> *People v. Rector*, 19 Wend. (N. Y.), 569.

§ 224. *Exhibiting instrument*.—After testimony of an expert that a wound was caused by a designated kind of instrument, has been properly received, it is competent to show the witness an instrument unquestionably proven to have been in the hand of the accused, and ask if such an instrument would produce such wounds.

*People v. Carpenter*, 102 N. Y., 238, 249.

*Gardiner v. People*, 6 Park. Cr. (N. Y.), 155, 202.

S. P., *Kennedy v. People*, 39 N. Y., 245; s. c., 5 Abb. Pr., N. S. (N. Y.), 147.

Compare *Wilson v. People*, 4 Park. Cr. (N. Y.), 619.

§ 225. *Cause of suicide*.—Whether the suicide of a person hypothetically regarded as subject to melancholia, might be attributed to the disease, is not a question for an expert witness, but for the jury.

*Van Zandt v. Mutual Benefit Life Ins. Co.*, 55 N. Y., 169; s. c., 14 Am. Rep., 215.

Otherwise of an expert's testimony as to effect of melancholia upon one who was his own patient. *Koenig v. Globe Mut. Life Ins. Co.*, 10 Hun (N. Y.), 558.

§ 226. *Cause—in matter involving special knowledge*.—On any subject not within the common knowledge and experience of men of common education, in the ordinary walks of life an expert witness may be asked the cause of a casualty,<sup>1</sup> or a defect in a machine or structure.<sup>2</sup>

<sup>1</sup> *Seaver v. Boston, etc., R. R.*, 80 Mass. (14 Gray), 466 (action by employee of road for injury when car derailed. Held, that the question what threw off the car when the axle broke, so far involved the application of forces as to be proper for an expert).

*Murphy v. N. Y. Central R. R. Co.*, 66 Barb. (N. Y.) 125. (Witness familiar with the elementary principles of mechanics, and who has testified to the condition of the track on a curve may be asked how he accounted for the cars running off on the inside of the curve instead of the outside. Such a question does not require an expert in building railroads.)

A newspaper editor, who has visited the scenes of numbers of railroad accidents, and examined into their causes, for the purpose of reporting them, is not thereby qualified as an expert, to testify to his opinion as to the cause of the breaking of a particular rail. *Hoyt v. Long Island R. R. Co.*, 57 *N. Y.*, 678.

<sup>2</sup> *Lotz v. Scott*, 103 *Ind.*, 155; s. c., 1 *Western Rep.*, 177 (action for nuisance: error to refuse to allow expert in brick-laying, who built the wall, to give his opinion as to what caused its damp condition).

*Hand v. Inhabitants of Brookline*, 126 *Mass.*, 324, 326, (cause of leak in water pipes).

*Chandler v. Thompson*, 30 *Fed. Rep.*, 38 (whether defective work of mill was caused by defective construction or bad management).

*In State v. Baldwin*, 36 *Kan.*, 1, 12, experts in wood-working were allowed to testify that a panel cut out of a door was cut by a skilled hand, the accused being a carpenter, and that a knife found in his pocket fitted the mark of the cut.

§ 227. *Direction of blow, force or fluid.*—A witness who observed the traces left by a physical force or movement may state the direction in which the force appeared to have been applied.

*State v. Rainsbarger*, 71 *Iowa*, 746; s. c., 31 *Northwestern Rep.*, 865. (Murder. Not error to allow witness to testify that the buggy of the deceased appeared to have been broken by force applied at the top of the wheel; and by pulling the shaft outward by force applied at the forward end; and that the buggy was strong enough to carry two ordinary-sized men without breaking.)

*Comm. v. Sturtevant*, 117 *Mass.*, 122, 132. (A witness upon the trial of an indictment for murder, who is familiar with blood and has examined, with a lens, a blood stain upon a coat when it was fresh, is competent to state that the appearance then indicated the direction from which it came, and that it came from a blow upward, although he had never experimented with blood or other fluid in this respect.)

*Hopt v. Utah*, 120 *U. S.*, 430; 30 *Law. ed.*, 708; 7 *Supm. Ct. Rep.*, 614 (direction of blow by which fatal wound on head was caused. This does not require expert testimony).

[These rulings are well supported by the principle which allows testimony to a collective fact, the knowledge of which is derived from minutiae. See § 216, thus considered they are not inconsistent with § 222, 3.

On the trial of Linsday (*Syracuse*, 1874), 63 *N. Y.*, 143; att'g 5 *Hun* (*N. Y.*), 104; s. c., 67 *Barb.* (*N. Y.*), 548, the people offered to show, by the opinion of a physician, that the fracture in the skull which an accomplice of the accused testified the accused caused with an ax, was produced by a right-handed blow, such as the accused always struck, while the accomplice it was claimed always struck a left-handed blow with an ax held in both hands. *Held*, not admissible in the absence of exact proof of the situation of the deceased when the blow was struck.

§ 228. *What would have been.*—As to whether, and how, you may prove what would have been, see the following :

If the buildings were not destroyed by spread of fire. Mayor *v.* Pentz, 24 *Wend.* (*N. Y.*), 668.

Obstruction to stream. Cooper *v.* Mills Co., 60 *Iowa*, 350; Gault *v.* Concord R. R. Co., 63 *N. H.*, 356; s. c., 1 *New England Rep.*, 254; Moyer *v.* N. Y. Central R. R. Co., 12 *N. Y. Weekly Dig.*, 188; Ball *v.* Hardesty, 38 *Kan.*, 540; s. c., 16 *Pacific Rep.*, 808.

If careful in navigation. New England Glass Co. *v.* Lovell, 61 *Mass.*, 319; Boice *v.* Thames etc. Ins. Co., 38 *Hun* (*N. Y.*), 246; McKerchnie *v.* Standish, 6 *N. Y. Weekly Dig.*, 433.

If not careless in use of machinery. Chandler *v.* Thompson, 30 *Fed. Rep.*, 38; Buxton *v.* Somerset etc. Works, 121 *Mass.*, 446; Stowe *v.* Bishop, 58 *Vt.*, 498; s. c., 2 *New England Rep.*, 110.

If sufficiently warned. McDermott *v.* Third Ave. R. Co., 44 *Hun* (*N. Y.*), 107.

If assistance had been rendered. Otis *v.* Thom, 23 *Ala.*, 469; s. c., 58 *Am. Dec.*, 303; with note.

If blasting operations carried out according to ordinance. Koster *v.* Noonan, 8 *Daly* (*N. Y.*), 231.

If land cultivated. Sickles *v.* Gould, 51 *How. Pr.* (*N. Y.*), 22.

If railroad track inclosed. Winkler *v.* St. Louis etc. R. Co., 21 *Mo. App.*, 99; s. c., 3 *Western Rep.*, 433.

If bridge properly constructed. Cooper *v.* County of Mills, 69 *Iowa*, 350; s. c., 28 *Northwestern Rep.*, 633.

§ 229. *Experiments to corroborate opinion.*—An expert who has made experiments to qualify him to give an opinion as to cause, may be allowed, against objection, to state the details of such experiments on his direct examination, or they must be left to the discretion of the court to be called for on cross-examination.

The contrary was held in Ingledew *v.* Northern R. R. Co., 73 *Mass.* (7 *Gray*), 86. (Negligent freezing of ink.

Details of experiments as to whether the temperature, like that at the time in question, would freeze such ink, excluded on direct.)

[That ruling is discredited in *Lincoln v. Taunton Copper Mfg Co.*, 9 *Allen (Mass.)*, 181. The better opinion is that it is in the discretion of the court to allow such evidence.]

As to experiments to prove cause, See *Criminal Trial Brief*, 328, § 567.

§ 230. *Suggestion of another cause.*—To negative the inference that the effect was due to the cause to which it is attributed, the adverse party may show that it might have proceeded from some other cause<sup>1</sup> and for this purpose may prove the results of experiments made with such other cause.

<sup>1</sup> *Quinn v. Higgins*, 63 *Wisc.*, 664; s. c., 24 *Northwestern Rep.*, 482. (Malpractice in setting broken limb. *Held*, error to exclude question, though leading, whether non-union after fracture might take place under the best of treatment.)

*Chandler v. Thompson*, 30 *Fed. Rep.*, 38. (Whether defective work of mill was due as alleged to defective construction, or to unskillful use.)

*S. P., State v. Morgan*, 95 *N. C.*, 641 (causes of death without leaving external mark).

*Rowell v. Lowell*, 77 *Mass.*, (11 *Gray*), 420 (injury to person, without leaving external manifestation).

*Moyer v. N. Y. Centr. etc. R. R. Co.*, 98 *N. Y.*, 645 (action for injury by current upon river bank).

<sup>2</sup> *Lincoln v. Taunton Copper Co.*, 9 *Allen (Mass.)*, 181, 192.

[Such evidence may also be competent as tending to reduce the damages for which the defendant is liable. *Doyle v. N. Y. Eye & Ear Infirmary*, 80 *N. Y.*, 631, 633.]

§ 231. — *cross examination.*—For the purpose of controverting the opinion of a witness as to the cause, inferred from certain appearances proved to exist, he may be asked on cross examination what would he think if, under similar appearances, the existence of another specified cause should be also proved;<sup>1</sup> or what would have been the indications if another specified cause had operated.<sup>2</sup>

<sup>1</sup> *Comm. v. Mullins*, 2 *Allen (Mass.)*, 295 (cause of death).

<sup>2</sup> *Erickson v. Smith*, 2 *Abb. (N. Y.) Ct. App. Dec.*, 64; s. c., 38 *How. Fr. (N. Y.)*, 454 (cause of death).

§ 232. *Rebutting suggestion of other cause*.—After evidence showing another possible cause has been given, rebutting evidence is then competent to show the condition of what is thus claimed to have been the cause, as negating that claim.<sup>1</sup> But if the inquiry is not limited to the same time, there must be evidence that the condition meanwhile continued the same.<sup>2</sup>

<sup>1</sup> *Collins v. N. Y. Central etc. R. R. Co.*, 23 *Weekly Dig.*, 154 (defendants being sued for firing plaintiff's building, having claimed that an engine of another company was the cause, evidence of the good condition of that engine becomes competent).

<sup>2</sup> Same case, 109 *N. Y.*, 243, reversing the above decision for error in not applying this qualification.

§ 233. *Cause unknown to expert*.—To show the improbability of an imputed cause, an expert may be asked whether he has ever known a case.

*Doyle v. N. Y. Eye & Ear Infirmary*, 80 *N. Y.*, 631, 633.

§ 234. *Presumption of continuance*.—The presumption that the same defective condition of a machine continued does not avail to let in evidence of other injuries occurring after a considerable lapse of time, unless the party shows either that the defect was one of construction, or that the structure was in the same condition as to non-repair.

*Collins v. N. Y. Central R. R. Co.*, 109 *N. Y.*, 243.

§ 235. *Declarations as part of res gestæ*.—Declarations of a person as to the cause of his injury, as that he had fallen down stairs, made immediately after the occurrence, and in connection with it are admissible even in his favor as part of the *res gestæ* to show such cause.

*Travelers Ins. Co.*, 8 *Mosley*, 8 *Wall. (U. S.)* 397; *s. c.*, 19 *Law. ed.*, 437 (an extreme case in favor of admissibility).

See *Criminal Trial Brief*, §§ 628-631, where the general rule and other cases are collected.

## CHARACTER.—[See also CARE, HABITS.]

### I.—REPUTATION.

§ 236. Good character, when competent.

237. How proved.

### II.—COMPETENCY AND SKILL.

§ 238. Direct testimony.

239. Single instances.

240. Intoxication.

241. Inspection.

242. General reputation.

## I.—REPUTATION.

§ 236. *Good character, when competent.*—The rule that one accused of crime may give evidence of good character as strengthening the presumption of innocence and tending to negative guilt,<sup>1</sup> does not obtain in civil actions even though a criminal act be directly involved,<sup>2</sup> unless character is put in issue by the pleadings or evidence of general bad character has been received against him.

<sup>1</sup> For this rule and its application, see *Criminal Trial Brief*, §§ 460, 473.

<sup>2</sup> *Pratt v. Andrews*, 4 N. Y., 493.

Approved in *Stone v. Hawkeye Ins. Co.*, 68 *Iowa*, 737; s. c., 28 *Northwest. Rep.*, 47, citing cases from other jurisdictions.

*Fahey v. Crotty*, 63 *Mich.*, 371; s. c., 6 *Western Rep.*, 135, 137.

*S. P.*, *Bates v. Barber*, 58 *Mass.* (4 *Cush.*), 107.

*Continental Ins. Co. v. Jachnichen*, 110 *Ind.*, 59; s. c., 10 *Northeast. Rep.*, 636.

*Simpson v. Westonberger*, 28 *Kans.*, 756; s. c., 15 *Centr. L. J.*, 429.

For the application of this rule in various particular actions, see 16 *Centr. L. J.*, 202; 25 *Id.*, 148.

§ 237. *How proved.*—Character, in the sense of reputation, how proved.

*Abb. Tr. Ev.*, 674 (actions involving defamation).

*Criminal Trial Brief*, 236, § 398; 271, § 460, etc.; 360, § 602 (prosecutions for crime).

## II.—COMPETENCY AND SKILL.

§ 238. *Direct testimony.*—A witness who has had adequate opportunities of observation may be asked whether a person appeared to be competent to his place.

*Gahagan v. Boston etc. R. R. Co.*, 83 *Mass.* (1 *Allen*), 187.

*Wheeler v. Delaware etc. Canal Co.*, 20 *N. Y. Weekly Dig.*, 301, aff'd without opinion in 99 *N. Y.*, 616 (engineer was asked how fireman performed his duties, and whether he understood the working of the engine; and answered: "he always handled her well while he was with me; that is, when I asked him to move her one way or another he done so." *Held*, proper; because the skillfulness of a mechanic is a collective fact).

§ 239. *Single instances*.—Carelessness on a single previous occasion is not alone competent, to show unfitness for service; but carelessness on several occasions is, if accompanied by evidence of notice to the employer.

Baltimore Elevator Co. v. Neal (*Md.*, 1886), 3 *Centr. Rep.*, 856.

Baulec v. N. Y. & Harlem R. R. Co., 59 *N. Y.*, 356; s. c., 17 *Am. Rep.*, 325; aff'g in effect, 12 *Abb. Pr. N. S.*, (*N. Y.*), 310; s. c., 5 *Lans. (N. Y.)*, 436; 62 *Barb. (N. Y.)*, 623.]

§ 240. *Intoxication* at a time within the period of service is relevant to the question of the competency of a servant.

Probst v. Delamater, 100 *N. Y.*, 266.

§ 241. *Inspection*.—The jury may consider the appearance and conduct of a witness, to aid them in determining whether he has suitable qualifications and intelligence to be entrusted with a responsible duty.

Keith v. New Haven & N. R. Co., 140 (*Mass.*), 175; s. c., 3 *Northeastern Rep.*, 20.

DEVENS, J., says, the same principle applies, when the inquiry relates to intelligence and understanding as well as physical capacity.

§ 242. *General reputation* for care and skill is not competent to show disposition or habitual character.

Baldwin v. Western R. R., 70 *Mass.* (4 *Gray*), 333 (careless driver).

[It may be competent, to show notice to an employer.]

Cincinnati, etc. R. Co. v. Jones, 111 *Ind.*, 259; s. c., 9 *Western Rep.*, 602; 12 *Northeast. Rep.*, 113 (disposition of horse).

S. P., Brooks v. Action, 117 *Mass.*, 204.

## CITIZENSHIP.—[See also NATURALIZATION.]

§ 243. Distinguished from residence. § 245. Passport.

244. Presumption.

246. Hearsay.

§ 243. *Distinguished from residence*.—An allegation of residence cannot avail as equivalent to an allegation of citizenship for the purpose of giving jurisdiction.

Menard v. Goggan, 121 *U. S.*, 253; s. c., 30 *Law. ed.*, 914; 7 *Supm. Ct. Rep'r*, 873 (at law).

Everhart v. Huntsville College, 120 *U. S.*, 223; s. c., 30 *Law. ed.*, 623; 7 *Sup. Ct. Rep'r*, 555 (in equity).

In citizenship, residence and intent must concur; a man may reside a while within a state without becoming a citizen. *Sharon v. Hill*, 26 *Fed. Rep.*, 337; *State Savings Asso. v. Howard*, 31 *Id.*, 433.  
For other authorities, see *Trial Evidence*, 102, etc.

§ 244. *Presumption*.—To support an apparent right,<sup>1</sup> or to avoid an inference of illegal conduct,<sup>2</sup> citizenship will be presumed, in the absence of evidence to the contrary.

<sup>1</sup> *Blight v. Rochester*, 7 *Wheat. (U. S.)*, 535; 5 *Law. ed.*, 516.

*Shelton v. Tiffin*, 6 *How. (U. S.)*, 163, 185 (so holding of residents).

<sup>2</sup> *People v. Pease*, 27 *N. Y.*, 45, followed in *Garfield M. & M. Co. v. Hammer*, 6 *Mont.* 53; s. c., 8 *Pacific Rep.*, 153.

§ 245. *Passport*.—A passport issued by our government is not, of itself, evidence of citizenship, for the purpose of a judicial trial. It is but an ex parte certificate; and if founded upon evidence produced to the secretary of state establishing citizenship, that evidence, if admissible, should be produced to render the passport competent.

*Urtetiqui v. D'Arcy*, 9 *Pet. (U. S.)*, 692; s. c., 9 *Law. ed.*, 276.

§ 246. *Hearsay*.—Citizenship is not a fact of pedigree to be proved by declarations in the nature of hearsay.

Anon. case cited in 1 *Pick. (Mass.)*, 247 (alienage of a deserter from the army).

CLAIM.—[For kindred topics see ADVERSE POSSESSION, POSSESSION, and NEGATIVE.]

§ 247. *Direct testimony*.—A witness may, subject to cross-examination, as to details, testify that a person in possession claimed a fee, or a dower interest, or a reversion, etc., as the case may be.<sup>1</sup>

So he may testify that he never heard any other person claim the property.<sup>2</sup>

<sup>1</sup> *Hancock v. Kelly*, 81 *Ala.*, 368.

*Compare Niles v. Patch*, 79 *Mass.* (13 *Gray*), 254, (witness who testified he had been accustomed to go upon the premises. not allowed to be asked what for). Abstract of title, delivered by vendor, competent to show his claim of title, as against him. *Hartley v. James*, 50 *N. Y.*, 38.



<sup>2</sup> *Maxwell v. Harrison*, 8 *Ga.*, 61; s. c., 52 *Am. Dec.*, 385.

## COLLATERAL ORAL AGREEMENT.

§ 248. *The rule against oral evidence to vary a writing* does not preclude proving an oral stipulation collateral to even a sealed contract, if the object is not to show a breach of the contract as thus modified, but merely to enforce the oral stipulation itself; and this may be done even by way of counterclaim against the liability arising on the written contract.

*Westchester etc. R. R. Co. v. Broomall* (*Pa.*, 1886), 2 *Centr. Rep.*, 520 (rev'g for error in excluding evidence of an oral stipulation upon which a conveyance reciting only a nominal consideration was made).

*Van Brunt v. Day*, 8 *Abb. N. C.*, 336; s. c., 81 *N. Y.*, 251 (oral agreement of assignee of mortgage with guaranty, to keep premises insured, in consideration of being allowed to retain part of the price of assignment, held available as a counter claim on foreclosure).

*Richardson v. Traver*, 112 *U. S.*, 423, 431; s. c., 28 *Law. ed.*, 804 (recital of \$100 as the consideration does not preclude evidence of promise to pay a large amount of outstanding debt; for this is not inconsistent with the deed. So held on the question of the duty to perform the collateral promise).

*United States v. Peck*, 102 *U. S.*, 64. (The government claimed to recoup against price of wood, damages for not delivering hay also called for by the contract. *Held*, competent for plaintiff to show that at the time and place of making the contract it was understood that the contractor was to rely on the grass at a particular place, that being the only supply within hundreds of miles; and that afterward the government, fearing he would make default, allowed other persons to cut this grass to supply the purpose for which the contract was made).

*Braly v. Henry*, 71 *Cal.*, 481; s. c., 11 *Pacific Rep.*, 385 and *cas. cit.* (recoupment of damages for breach of oral agreement, so as to reduce recovery on note).

## COMPROMISE.

§ 249. *Conclusive.*—A written promise to pay a sum agreed on as due upon a disputed claim cannot be defeated by proving that nothing was due.

*Dunham v. Griswold*, 100 *N. Y.*, 224.

CONCEALMENT.—[And see ABSENCE, and FICTITIOUS PERSON.]

§ 250. Positive acts.

§ 251. Circumstantial evidence.

§ 250. *Positive acts* calculated to prevent discovery must be shown.

Rhoton *v.* Mendenhall (*Oreg.*, 1888), 20 *Pacific Rep.*, 49, and cases cited.

Living under an assumed name is not, alone, concealment. Engel *v.* Fischer, 102 *N. Y.*, 400; rev'g 15 *Abb. N. C.*, 72; s. c., 51 *N. Y. Super. Ct. (J. & S.)*, 71.

§ 251. *Circumstantial evidence*.—Absence, and the declarations of persons at the abode refusing information or answering inquiries evasively, may be sufficient evidence of concealment.

Genin *v.* Tompkins, 12 *Barb. (N. Y.)*, 265, 284.

Baker *v.* Stephens, 10 *Abb. Pr. N. S. (N. Y.)*, 1, 12, 27.

CONDITION of PERSONS, PLACES and THINGS. [See also FORGOTTEN FACT, and NEGATIVE. As to *conditional delivery*, etc., see CONTRACT and DELIVERY.]

#### I.—CONDITION OF PERSONS.

§ 252. Condition in life.

253. Financial condition.

254. — general reputation.

255. Physical condition; photograph.

256. — direct testimony.

257. — inspection in court, voluntary exhibition.

#### II.—CONDITION OF PLACES AND THINGS.

258. Direct testimony.

§ 259. — what witness observed.

260. Combining testimony of several witnesses.

261. Condition of another time or place.

262. — laying foundation for the evidence.

263. Inspection in court.

264. Official inspection.

265. Use of correct photograph or map.

266. Use of approximate plans, maps, etc.

267. — reasonable accuracy.

I.—CONDITIONS OF PERSONS.—[See also ABILITY, FEELINGS, HEALTH, AND DISEASE, AGE, INTOXICATION, AUTOPSY, and CAUSE.]

§ 252. *Condition in life*.—In an action for damages for a personal injury it is not error to show that plaintiff is a man of family, as the jury are entitled to know the situation and condition in life of a party or witness.

Perry *v.* Lansing, 17 *Hun (N. Y.)*, 34 (action for negligence).

§ 253. *Financial condition.*—A witness having had adequate opportunities of observation and hearing reputation may testify what were a man's circumstances as to property;<sup>1</sup> whether a man's business was profitable;<sup>2</sup> whether he was able to pay a specified sum, and whether he lived extravagantly.<sup>3</sup>

<sup>1</sup>Sheldon v. Root, 16 *Pick.* (*Mass.*), 567, 570.

<sup>2</sup>Bartlett v. Decreet, 4 *Gray* (*Mass.*), 111, 112, 113 (excluding question "from your knowledge of B. was his business profitable," merely because it was thus restricted. Another question based on examination of B.'s business was allowed at the trial by MELLE, C. J.).

<sup>3</sup>Griffin v. Brown, 2 *Pick.* (*Mass.*), 304, 309 (holding that to add that he had spent a larger sum as witness verily believes, is not objectionable, for it gives not mere opinion but reasons for the testimony).

§ 254. — *general reputation.*—General repute is not competent as tending to show financial condition;<sup>1</sup> but it is competent as tending to show knowledge thereof, or the good faith of a person who acted in reliance on such repute.<sup>2</sup>

<sup>1</sup>Sheldon v. Root, 16 *Pick.* (*Mass.*), 567.

<sup>2</sup>Blanchard v. Mann, 1 *Allen* (*Mass.*), 433.

§ 255. *Physical condition, photograph.*—A photograph, if proved to be correct, is competent to show the physical condition of a person as apparent to the eye, at the time it was taken.

Cowley v. People, 83 *N. Y.*, 464 (photographs of children ill-treated).

Reddin v. Gates, 52 *Iowa*, 210 (ferrotype of plaintiff's back and shoulder showing effect of assault).

As to mode of proof, see PHOTOGRAPHS.

§ 256. — *direct testimony.*—The rule which allows a witness to testify to his own condition does not admit his statement of what he learned about himself from his medical attendant, nor from others, even as to his condition when unconscious.

Hagadorn v. Connecticut Mut. Life Ins. Co., 22 *Hun* (*N. Y.*), 249.

§ 257. — *inspection in court, voluntary exhibition.*—If physical condition of a party is material, he has a right, when giving his testimony as to it, to exhibit it to the jury,

or to an expert called to describe the injury;<sup>1</sup> but he has not a right to make unsuccessful efforts before them, as evidence in his own behalf, of his incapacity.<sup>2</sup>

<sup>1</sup> *Mulhado v. Brooklyn City R. R. Co.*, 30 N. Y., 370 (the leading case).

<sup>2</sup> See ABILITY, and HANDWRITING.

As to *compulsory exhibition*, the better opinion is that a party not testifying in his own behalf, nor voluntarily exhibiting his condition, cannot be absolutely required at the instance of the adverse party to exhibit such condition.

But the court may require it as the condition of a favor; and in any case, refusal in a civil action may be considered by the jury as evidence against him.

As to *cross-examination*, the better opinion is that if he has testified in regard to it on his own behalf or voluntarily exhibited his physical condition, the court have power to require him upon cross-examination to exhibit it, and if, on direct, he has testified as to his ability to do an ordinary physical act, such as walking, reading, or writing, may require him to attempt such act in the presence of the jury.

See § 9 (ABILITY), and §§ 413, 414 (HANDWRITING).

II.—CONDITION OF PLACES AND THINGS. [See also CARE, CAUSE, QUALITY, QUANTITY.] As to VIEW, see *Criminal Trial Brief*, 413, §§ 684-6. *Civil Trial Brief*, p. 72.

§ 258. *Direct testimony*.—On a subject within the common knowledge and observation of ordinary life, any witness having had adequate opportunity of observation, may be asked what was the condition of a place or thing.<sup>1</sup>

And if the subject require special knowledge or experience, a witness so qualified may state his opinion.<sup>2</sup>

<sup>1</sup> *Lund v. Inhabitants of Tyngsborough*, 63 Mass., 36, 39 (a witness who has stated the condition of a thing may characterize it with the impression made on his mind at the time, as, "I thought it was a dangerous place . . . the condition was bad," for this is a statement of knowledge not of opinion).

*Kelleher v. City of Keokuk*, 60 Iowa, 473; abstr. s. c., 28 Alb. L. J., 334 (statement in affidavit that sidewalk was "in good repair" therefore competent).

Compare *Yeaw v. Williams*, 15 R. I., 20; s. c., 1 New Engl. Rep., 123 (holding that whether a highway was safe, convenient and in good repair at the time of the accident is not a subject for expert testimony. So held, where the question at issue was whether a post standing out at a curve of the road was dangerous).

Clark Civil Township *v.* Brookshire, 114 *Ind.*, 437; s. c., 13 *Western Rep.*, 379; 16 *Northeast. Rep.*, 132. (Witnesses acquainted with the highway and its condition before an improvement, and experienced in improving and maintaining highways, may give their own opinion as to the character of culverts, fills, and the amount of gravelling necessary to render a road in good repair).

<sup>2</sup>Moore *v.* Westervelt, 27 *N. Y.*, 234; s. c., 25 *How. Pr.*, 277; aff'g 9 *Bosw. (N. Y.)*, 558. (Expert may be asked "what was the condition of the fastenings of the vessel, as to safety;" for this is a subject of science and experience, not of common knowledge.)

Approved in Transportation Line *v.* Hope, 95 *U. S.*, 297, 299.

Rust *v.* Eckler, 41 *N. Y.*, 488, Opinion of WOODRUFF, J., at p. 495 (fitness of place to store cheese. DANIELS, J., deemed that the question did not call for the witness' opinion). Even under the present somewhat stricter rules an expert's opinion could be taken by an hypothetical question.

People *v.* Driscoll, 107 *N. Y.*, 414, 420; aff'g 9 *N. Y. State Rep.*, 820, 825 (allowing an officer familiar with firearms to answer that the barrel of a pistol was cold, and there was no indication that it had been fired).

Meyers *v.* State, 14 *Tex. App.*, 35, 48. (Assault: Witness experienced in the use of firearms may state that he had inserted the finger into the muzzle of the defendant's gun, and when the finger was withdrawn, it was wet and black, from which, in his opinion, the gun must have been recently discharged.)

Wynne *v.* State, 56 *Ga.*, 113, 118 (allowing a witness familiar with the use of a pistol, to express his opinion whether the cartridges had been punctured by snapping them before they were fired).

§ 259. — *what witness observed.*—A witness experienced in the use or care of things of a nature to require special care may be asked if he observed anything rendering the the place where they were kept unfit for the purpose; for this does not call for an opinion but an observation of fact.

Rust *v.* Eckler, 41 *N. Y.*, 488. Opinion of DANIELS, J. at p. 493 (WOODRUFF, J., deemed the question proper even as calling for an opinion).

A witness may testify that certain shoes appeared as if they had been recently washed, *Comm. v. Sturtivant*, 117 *Mass.*, 122, 138. (Trial of an indictment for murder. A leading case.)

§ 260. *Combining testimony of several witnesses.*—Evidence as to the condition of a particular place or thing may be made out by proving by one witness that at a specified time he pointed out the identical place or thing to another, and then proving by the latter the condition at the time it was so pointed out.

*Hirsch v. City of Buffalo*, 21 *Weekly Dig. (N. Y.)*, 312, aff'd it seems but without opinion, in 107 *N. Y.*, 671.

For other illustrations of this principle see FORGOTTEN FACT and IDENTITY.

§ 261. *Condition at another time or place*, when competent.

*Time.* *Ahern v. Steele*, 48 *Hun (N. Y.)*, 517 (evidence of condition of hole in pier within two days; and of measurement six months afterward "of the same hole" through which deceased fell,—competent).

*City of Chicago v. Dalle*, 115 *Ill.*, 386; s. c., 5 *Northwestern Rep.*, 578, 580. (Negligence in non repair of sidewalk. *Held*, competent to show the condition at the time of the accident, by proof of its condition a few days (in this case three or four days) before and afterward).

*Mackie v. Central Railroad of Iowa*, 54 *Iowa*, 540; s. c., 5 *Northwest, Rep.*, 723. (Condition of a gate at private crossing at a time two or three days after an accident, competent; and in the absence of other evidence it will be presumed that its condition remained unchanged.)

*Clancy v. Byrne*, 56 *N. Y.*, 129; s. c., 15 *Am. Rep.*, 391, with note, rev'g 65 *Barb. (N. Y.)*, 344. (A rotten plank in a pier will not, for the purpose of charging a lessor with damages for injuries, be presumed to have been in that condition five years previous to the injury caused by it.)

*Yates v. People*, 32 *(N. Y.)*, 509, 512, 518. (To prove how much light was thrown by a street lamp, a witness cannot testify to an examination of it made four months afterwards, there being no proof that the structure or condition of the lamp or the fluid used was the same.)

*Holden v. N. Y. Central R. R. Co.*, 54 *N. Y.*, 662. (Condition of poultry when ultimately received from a connecting carrier, admissible as tending to show its condition five days before, when delivered to such carrier by defendants after delay.)

*Place.* *Oil Co. v. Van Etten*, 107 *U. S.*, 325; s. c., 27 *Law ed.*, 319 (count of lumber at one end of route, competent to contradict count at the other end.)

*Lehigh Zinc & Iron Co. v. Trotter* (N. J., 1887), 7 *Central Rep.*, 481 (condition of ore in respect to moisture at the mine not provable by evidence of condition after transportation 62 miles in open car).

*Reed v. N. Y. Central R. R. Co.*, 45 N. Y., 574; overruling 56 *Barb.* (N. Y.), 493. (Evidence of the bad condition of railroad track half a mile away from the place of accident not admissible.)

*Murphy v. N. Y. Central R. R. Co.*, 66 *Barb.* (N. Y.), 125 (the same within a few rods admissible).

§ 262. — *laying foundation for the evidence.*—Slight evidence of the relative condition at the respective times is sufficient, when necessary, to render the testimony competent, leaving its weight to be determined by the jury.

*Nisbet v. Town of Garner* (Iowa, 1888), 1 *Law. Rep.* (Co-op. ed.), 153. (Negligence in condition of highway: *held*, that measurement of depth of depression some time after the accident, was competent, upon such comparison as to afford some data by which to determine what it was at the time of the accident.)

Opinions as to whether the article transported would stand the journey, excluded because involving the very question in issue against a carrier. *Gutwillig v. Zuberbier*, 41 *Hun* (N. Y.), 361.

§ 263. *Inspection in court.*—For the purpose of proving the condition of a thing, other than the contents of a document within the rule as to best and secondary evidence, its production in court is not necessary.<sup>1</sup>

A party may produce it, if he choose<sup>2</sup> but in a civil case cannot compel his adversary to do so.<sup>3</sup> If produced it may be exhibited to the jury and either party may examine a witness upon it, for the purpose of calling the attention of the jury to details pointed out by the witness,<sup>4</sup> and of getting the description upon the record.

<sup>1</sup> *Criminal Trial Brief*, 262, §§ 437, 438.

<sup>2</sup> See *Criminal Trial Brief*, 337, § 586; 387; §

<sup>3</sup> I state this in deference to the ruling in *Hunter v. Allen*, 35 *Barb.* (N. Y.), 42, but doubt its soundness.

<sup>4</sup> *King v. N. Y. Central etc. R. R. Co.*, 72 N. Y., 607. (Hook, the thing, the breaking of which caused the injury in issue, may, upon proof of its identity, and that it remains in the same condition as at the time of breaking, be shown to the jury; and a witness may be asked if he sees flaws or cross cracks in it.)

And see HANDWRITING.

§ 264. *Official inspection*.—An official certificate of inspection pursuant to law is evidence of the fact of inspection; but not of matters therein stated without being required by law, such as safety, etc.<sup>1</sup>

A certificate of voluntary inspection though official and pursuant to usage of trade, is not evidence of the facts stated in it;<sup>2</sup> but may be made so by testimony to it and its accuracy by those who made it.<sup>3</sup>

<sup>1</sup> *Errickson v. Smith*, 2 *Abb. (N. Y.)*, *Ct. App. Dec.*, 64. Compare *The Charles Morgan*, 115 *U. S.*, 69 (excluding finding of board of inspectors, as to cause of collision because made on an investigation only of facts bearing on conduct of an officer).

<sup>2</sup> *Murray v. Great Western Ins. Co.*, 39 *Hun (N. Y.)*, 581, and *cas. cit.* (survey of vessel).

<sup>3</sup> *United States v. Mitchell*, 2 *Wash. C. Ct.*, 478 (survey of vessel).

§ 265. *Use of correct photograph or map*.—A map<sup>1</sup> or photograph,<sup>2</sup> if proved to be correct as of the time to which the issue relates,<sup>3</sup> is competent evidence, even though made for the purposes of the trial.

[As to mode of proof see PHOTOGRAPHS.]

<sup>1</sup> *Curtiss v. Ayrault*, 3 *Hun (N. Y.)*, 487; *s. c.*, 5 *N. Y. Supm. Ct. (T. & C.)*, 611.

<sup>2</sup> *People v. Buddensieck*, 103 *N. Y.*, 487 (photograph of a fallen building, in prosecution for negligent construction).

*Blair v. Pelham*, 118 *Mass.*, 420 (photograph of defective highway, in action for injuries sustained thereby).

*Church v. City of Milwaukee*, 31 *Wisc.*, 512 (photograph of street, and premises injured by change of grade).

*Chestnut Hill & Spring House Turnpike Co. v. Piper*, 15 *W. N. C.*, 55 (photograph of bridges on turnpike, obstructing ditch and endangering travel,—admitted though it did not show the whole of the ground).

*Locke v. S. C. & P. R. Co.*, 46 *Iowa*, 109 (photograph of bridge defectively constructed, taken after the accident).

*Durst v. Masters*, *L. R.* 1 *Prob. Div.*, 373 (photograph of altar and communion table or retable, to show relative positions of articles on it).

*Cozzens v. Higgins*, 1 *Abb. (N. Y.) Ct. App. Dec.*, 451; *s. c.*, 33 *How. Pr. (N. Y.)*, 436 (photograph of a cellar from which plaintiff had been excluded by a trespass).



<sup>3</sup> *Hollenbeck v. Rowley*, 8 *Allen* (Mass.), 473 (photograph of rocks and rubbish deposited by trespass; excluded because not properly verified).

<sup>4</sup> *Curtiss v. Ayrault*, 3 *Hun* (N. Y.), 487, 490; s. c., 5 *N. Y. Supm. Ct. (T. & C.)*, 611 (reversing judgment for refusal to receive it).

*People v. Jackson*, 111 *N. Y.*, 362; s. c., 19 *Northeastern Rep.*, 54 (photograph including figures of men stationed for the purpose of marking position of those who were present at the time of the offense).

§ 266. *Use of approximate plans, maps, etc.*—On an issue involving the situation or condition of premises, a map, plan, or diagram, even though such as not to be competent as original evidence, may be used by counsel, in opening, to explain what he intends to prove.<sup>1</sup>

Such a paper, if proved to be reasonably correct, according to the object of the proposed testimony,<sup>2</sup> may be used before the jury to enable a witness to explain to them the facts to which he testifies.<sup>3</sup>

<sup>1</sup> *Batteshill v. Humphrey* (Mich., 1887), 31 *Northwestern Rep.*, 894, 903.

<sup>2</sup> *Calumet River R. Co. v. Moore* (Ill., 1888), 13 *Western Rep.*, 506; 15 *Northeast. Rep.*, 764 (plan of a contemplated improvement, which the proposed railway would prevent, admissible to show the uses of the property affected).

<sup>3</sup> *Clapp v. Norton*, 106 *Mass.*, 33 (holding that a plan so used does not thereby become evidence; and its going to the jury room without objection is no ground of exception).

§ 267. — *reasonable accuracy.*—On an issue not involving precise extent or boundaries, as in an action for overflowing lands, a plan of the premises showing the general situation and area, is competent in the discretion of the court, for that purpose, though it be not an accurate survey.<sup>1</sup>

But a calculation of a witness founded on a map or plan, is not competent unless the map is first shown to be reliable evidence.<sup>2</sup>

<sup>1</sup> *Paine v. Woods*, 108 *Mass.*, 160, 169; *S. P., Barrett v. Murphy*, 140 *Id.*, 133, 144.

*Armendaiz v. Stillman*, 67 *Tex.*, 458; s. c., 3 *Southwestern Rep.*, 678 (map made during low water, not therefore inadmissible on issue as to injury at time of high water).

<sup>2</sup> *Johnston v. Jones*, 1 *Black* (U. S.), 209, 225.

CONSENT.—[See also ACQUIESCENCE, AGREEMENT, ASSENT, DELIVERY, RATIFICATION.]

§ 268. *Unexpressed willingness* not equivalent to consent.

Ford v. Ford, 143 Mass., 577; s. c., 3 New Engl. Rep., 785.

CONSIDERATION.—[See also COLLATERAL ORAL AGREEMENT, CONTRACT, and DELIVERY.]

§ 269. Value.

270. Seal.

271. Bona fide purchaser for value.

272. Disproving nominal consideration.

273. Effect of disproving.

§ 274. Oral evidence to vary writing.

275. Executory consideration.

276. — agreement.

277. Legal, to displace recital of illegal consideration.

278. Previous agreement.

§ 269. *Value*.—Where only a money recovery is sought, a consideration of an indeterminate or exaggerated value, if fairly agreed on by the parties, is sufficient in law to bind the promissor, though inadequate in fact,<sup>1</sup> unless the evidence suffices to show fraud.

<sup>1</sup> Earl v. Peck, 64 N. Y., 596. (Services for a long time, held sufficient to sustain a promissory note exceeding in amount the value of the services. Judgment for plaintiff (in action on note) affirmed against defense of inadequacy of consideration).

Wolford v. Powers, 85 Ind., 294; s. c., 44 Am. Rep., 16 and cas. cit. (note for \$10,000 in consideration of a father's naming a child after the promissor).

§ 270. *Seal*.—At common law a seal raises a conclusive presumption of a consideration as between the parties and those claiming under them, even for the purpose of supporting an action on an executory covenant to pay money,<sup>1</sup> in the absence of fraud or mistake.

Under the American statute, the seal is presumptive evidence;<sup>2</sup> but is not conclusive unless the instrument is a release.<sup>3</sup>

<sup>1</sup> Mather v. Corliss, 103 Mass., 568. The latest English authorities prefer to state the rule as being that a sealed contract is valid without any consideration.

[But a seal is not evidence that the consideration was adequate, where the law requires adequacy to be affirmatively shown. Abb. Tr. Ev., 508.]

<sup>2</sup> Home Ins. Co. v. Watson, 59 N. Y., 390, rev'g 4 N. Y. Supm. Ct. (T. & C.), 226; s. c., 1 Hun (N. Y.), 643. Best v. Thiel, 79 N. Y., 15.

- <sup>3</sup> *Crossley v. The St. Louis*, 4 *Ben.*, 510.  
*Schmidt v. Herfurth*, 5 *Robt. (N. Y.)*, 124.

§ 271. *Bona fide purchaser for value*.—For the purpose of showing that a grantee was a purchaser for valuable consideration, within the protection of the recording act, it is enough to produce the deed to him reciting his payment of purchase money.<sup>1</sup>

Otherwise, of one alleged to be, for valuable consideration, in good faith, a purchaser from a trustee conveying in fraud.<sup>2</sup>

- <sup>1</sup> *Wood v. Chapin*, 13 *N. Y.*, 509. And even though no consideration is mentioned, the burden is on a subsequent purchaser to show that there was none, for the deed itself imports a consideration. *Boyton v. Rees*, 8 *Pick. (Mass.)*, 329, 332.

- <sup>2</sup> *Bolton v. Jacks*, 6 *Robt. (N. Y.)*, 166, 234. So also of the claim of protection against a mechanic's lien. *Bolton v. Johns*, 5 *Pa. St.*, 145; s. c., 47 *Am. Dec.*, 404.

§ 272. *Disproving nominal consideration*.—If even a nominal consideration is recited, especially in a sealed instrument, evidence that it was not actually paid does not, without evidence that there was no agreement to pay it, disprove consideration, nor throw the burden on the other party.<sup>1</sup>

In an unsealed instrument, if a nominal consideration is recited as having been paid, evidence that it was not paid nor agreed to be paid throws the burden of proof on the party claiming under it to show that it was agreed to be paid, or that there was some other consideration.<sup>2</sup>

- <sup>1</sup> *Childs v. Barnum*, 11 *Barb. (N. Y.)*, 14, aff'g 1 *Sandf. (N. Y.)*, 58 (saying that "paid" means "paid or to be paid").

- <sup>2</sup> *Fargis v. Walton*, 107 *N. Y.*, 398, 403; s. c., 9 *Cent. Rep.*, 905; 14 *Northeast. Rep.*, 303 (tenant's agreement that landlord might enter and repair, held therefore revocable).

§ 273. *Effect of disproving*.—When by reason of disproving the consideration recited in an instrument, the instrument is deprived of its validity as a contract, oral evidence is no longer incompetent to vary the effect sought to be

given to it as a license<sup>1</sup> or admission, unless there is sufficient evidence to found an estoppel upon its language.

*Fargis v. Walton* (*above cited*).

§ 274. *Oral evidence to vary writing.*—Oral evidence of the actual consideration of a deed may be given, whether the deed states a greater<sup>1</sup> or a less<sup>2</sup> consideration, or a nominal one,<sup>3</sup> or one of a different nature,<sup>4</sup> or none at all.<sup>5</sup>

This, however, cannot be done for the purpose of defeating the operative words of the transfer for which the consideration was acknowledged as received,<sup>6</sup> unless there be also evidence of fraud, mistake or usury or other illegality. Proving that the deed was only a mortgage is not defeating it within the meaning of this exception.

Nor can it be done to impair the remedy of a purchaser under the grantee in the deed, against the grantor, upon the grantor's covenants for title.

<sup>1</sup> *Baker v. Connell*, 1 *Daly* (N. Y.), 469.

So non-payment may be proved, in action to recover the price. *Hebbard v. Haughian*, 70 N. Y., 54; *Beach v. Packard*, 10 *Vt.*, 96; s. c., 33 *Am. Dec.*, 185.

<sup>2</sup> *Belden v. Seymour*, 8 *Conn.*, 304; s. c., 21 *Am. Dec.*, 661.

<sup>3</sup> *Hitz v. Natl. Metrop. Bk.*, 111 *U. S.*, 722, 727; s. c., 28 *Law. ed.*, 577.

*Westchester R. R. Co. v. Broomall* (*Pa.*, 1886); s. c., 2 *Centr. Rep.*, 520 (reversing for exclusion).

*Bank of United States v. Housman*, 6 *Paige* (N. Y.), 526, 535 (recital of money does not preclude evidence in support of the deed that the actual consideration was love and affection). [*Contra*, *Burrage v. Beardsley*, 16 *Ohio St.*, 438; s. c., 47 *Am. Dec.*, 382.]

*McCrea v. Purmort*, 16 *Wend.* (N. Y.), 460 (recital of money consideration does not preclude evidence of agreement that consideration was merchandise at a price).

*McKinster v. Babcock*, 26 N. Y., 378, rev'g 37 *Barb.*, 265 (recital of cash: evidence of indemnity against indorsement and future liabilities, competent).

*Groves v. Steel*, 2 *La. Ann.*, 480; s. c., 46 *Am. Dec.*, 551 (recital cash; evidence that it was satisfaction of a debt, competent).

<sup>5</sup> *Goodell v. Pierce*, 2 *Hill* (N. Y.), 659.

*Wallis v. Wallis*, 4 *Mass.*, 135.

<sup>6</sup> *Grout v. Townsend*, 2 *Hill* (N. Y.), 554; aff'd in 2 *Den.* (N. Y.), 336.

*Blodgett v. Hildreth*, 103 *Mass.*, 484, 487.

§ 275. *Executory consideration.*—When the consideration clause is in the nature not of a receipt, but of an executory stipulation for payment with a specific thing, the parties may be deemed to have embodied their actual intention in the writing so as to exclude oral evidence to vary it.

*Maigley v. Hauer*, 7 *Johns. (N. Y.)*, 341 (expressed consideration a ground rent, and a share of grain to be raised. Evidence of oral promise to support, excluded).

§ 276. *Executory agreement.*—If the instrument is not an executed transfer but a unilateral executory agreement, as for instance a guaranty, the recital of a nominal consideration does not exclude oral evidence that the true consideration was a promise which the party has refused to perform.

*Unger v. Jacobs*, 7 *Hun (N. Y.)*, 220 (reversing judgment for error in exclusion).

So if the instrument is a subscription paper, the recital of a nominal consideration mutually paid does not preclude evidence that it was not paid, for the purpose of defeating the contract before any substantial consideration has arisen under it. *Presby. Church of Albany v. Cooper*, 112 *N. Y.*, 517.

*S. P.*, *Thudium v. Yost (Pa., 1887)*, 9 *Centr. Rep.*, 687; *s. c.*, 11 *Atl. Rep.*, 436; 20 *W. N. C.*, 217.

*Cake v. Pottsville Bank*, 116 *Pa. St.*, 264; *s. c.*, 8 *Centr. Rep.*, 394; 9 *Atl. Rep.*, 302; 19 *W. N. C.*, 423.

§ 277. *Legal, to displace recital of illegal consideration.*—The statement of an illegal consideration in a written instrument, may be contradicted by oral evidence that the actual consideration was legal, even for the purpose of enforcing the instrument notwithstanding its apparent illegality.

*Roosevelt v. Dreyer*, 12 *Daly (N. Y.)*, 370 (pawnbroker's usurious ticket, explained by oral agreement for legal interest only).

§ 278. *Previous agreement.*—The fact that the agreement constituting the actual consideration was made some time previous to the deed does not preclude the evidence, if it be shown that it was upon that consideration that the deed was founded.

*Hays v. Peck*, 107 *Ind.*, 389; *s. c.*, 5 *Western Rep.*, 630. (This case goes to the extent of holding that under the Indiana decisions and as the necessary consequence of holding the consideration clause not conclusive, an

oral promise of the grantee to pay a specified incumbrance may be proved in the grantor's action on the covenant against incumbrances.)

To the same effect in Missouri 1886, *Dobyns v. Rice*, 22 *Mo. App.*, 448; s. c., 4 *Western Rep.*, 898.

## CONSPIRACY.

§ 279. *Circumstantial evidence*.—The joint undertaking,<sup>1</sup> and the unlawful object<sup>2</sup> may be shown by circumstantial evidence without direct evidence of conspiracy.

<sup>1</sup> *Riehl v. Evansville Foundry Asso.*, 104 *Ind.*, 70; s. c., 3 *Northeastern Rep.*, 633, 635 (letting in declarations of one confederate, as evidence against another).

*Kelley v. People*, 55 *N. Y.*, 555, 576; s. c., 14 *Am. Rep.*, 342; aff'g *Armsby v. People*, 2 *Supm. Ct. (T. & C.)*, 157.

*Mussel Slough Case*, 5 *Fed. Rep.*, 680 (charging jury that to prove conspiracy alleged, it is not necessary to show that the defendants came together, etc.).

*Compare N. Y. Guaranty & Indem. Co. v. Gleason*, 78 *N. Y.*, 503; s. c., 7 *Abb. N. C. (N. Y.)*, 334.

<sup>2</sup> *State v. Walker (Mo., 1888)*, 39 *Alb. L. J.*, 133.

As to *Declarations*, etc., see *Criminal Trial Brief*, §§ 543-554. As to *Order of proof*, *Id.*, §§ 347, etc., 533; and *Abb. Tr. Ev.*, 191.

Slight evidence sufficient to let in declarations. *Criminal Trial Brief*, 317, § 552.

*Weidner v. Phillips*, 39 *Hun (N. Y.)*, 1.

CONSTRUCTION.—[For cognate topics see CAPACITY, CARE, CAUSE, QUALITY.]

§ 280. Judicial notice.

§ 282. Opinion.

281. Quality of work:—Direct question.

§ 280. *Judicial notice* taken of mode of construction of things in such common use that they may be regarded as forming part of the common knowledge of the people.

*Brown v. Piper*, 91 *U. S.*, 38, 43 (ice cream freezer not novel).

Otherwise not. *Kaolatype Engr. Co. v. Hoke*, 30 *Fed. Rep.*, 444.

§ 281. *Quality of work:—Direct question*.—An expert may be asked the direct question whether a machine or other structure not within the ordinary knowledge and

experience of men generally in the common walks of life, was built in a good and workmanlike manner;<sup>1</sup> whether it was properly constructed;<sup>2</sup> whether it is of the best kind,<sup>3</sup> or equal to the best in use,<sup>4</sup> and the like; and it may be left for the cross-examination to call for details.\*

<sup>1</sup> *Ward v. Kilpatrick*, 85 *N. Y.*, 413; s. c., 39 *Am. Rep.*, 674; aff'g 9 *N. Y. Weekly Dig.*, 343 (cabinet work).

So a witness who has examined buildings in question may, though he be neither a mason or an expert, testify that in his opinion one of two buildings was built more *compactly* than the other; or that a wall was not worth covering; that the materials were worth more than the wall. *Pullman v. Corning*, 9 *N. Y.*, 93; aff'g 14 *Barb. (N. Y.)*, 174 (*Held* not error to allow these questions, justice having been done on the merits.)

<sup>1</sup> In an action on a policy of insurance on "brick buildings," it appeared that the buildings in question were, in part, built of joists, filled in with brick. *Held*, not improper to allow plaintiff to ask a builder, acquainted with the houses, whether "he would consider them, or would they be called brick buildings." *Mead v. Northwestern Ins. Co.*, 7 *N. Y.*, 530, 537.

<sup>2</sup> *Sheldon v. Booth*, 50 *Iowa*, 209, 211. (Action for price; defence breach of warranty. *Held*, that a "foundryman and machinist" is competent to state whether a machine had been properly constructed.)

<sup>3</sup> *Great Western R. R. Co. v. Haworth*, 37 *Ill.*, 346, 349. (Negligent setting of fire. Testimony to opinion that a certain spark arrester was the best known, allowed.)

<sup>4</sup> *Scattergood v. Wood*, 79 *N. Y.*, 263; aff'g 14 *Hun (N. Y.)*, 269 (Quality of saw gin; allegation of breach of warranty. Testimony, whether it was equal in all respects to the best saw gin then in use, of which the witness had knowledge, allowable).

<sup>5</sup> *Curtis v. Gano*, 26 *N. Y.*, 426. (Action for breach of agreement to construct). Judgment reversed for excluding the question until plaintiff would offer to prove in what respect it was not so constructed.

§ 282. *Opinion*.—An expert,<sup>1</sup> but not an ordinary witness,<sup>2</sup> may be asked how a structure of a special kind, such as a bridge<sup>1</sup> or embankment<sup>2</sup> ought to be built so as to be safe, or so as not to injure adjoining property.

<sup>1</sup> *Conrad v. Trustees of Ithaca*, 16 *N. Y.*, 158, 173 (proper construction of bridge).

<sup>2</sup> *Brown v. Mohawk & Hudson R. R. Co. (Ct. of App., 1847), How. App. Cas., 52, 124.* (Action for negligence in construction resulting in devastation of plaintiff's grounds, in a freshet; judgment reversed for this error.)

Whether it is safe and proper to have draws with gates across the foot path of a bridge when the draw is open, is not within the range of competent testimony even from an expert. *So held*, when called for upon cross-examination. *Hart v. Hudson River Bridge Co., 84 N. Y., 56.* The court say it does not relate to the safety or strength of construction, but is matter of common judgment, for the jury.

CONTRACT.—[For cognate topics see ACCEPTANCE, AGENCY, CONSIDERATION, ASSENT, ADMISSIONS, COLLATERAL ORAL AGREEMENT, CONVERSATION, CONTRADICTION, CORROBORATION, ACQUIESCENCE and RATIFICATION.]

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| § 283. Implied.                    | § 289. Different contract admissible under general denial. |
| 284. Direct testimony.             | 290. With whom.  |
| 285. Witness' understanding.       | 291. Ignorance of effect.                                  |
| 286. Writing not signed.           | 292. Contract made merely to influence others.             |
| 287. Declarations of agent.        |  |
| 288. Previous similar transaction. |  |

§ 283. *Implied*.—A contract cannot be implied without writing where the law requires a writing.

*Chase v. Second Ave. R. R. Co., 97 N. Y., 384.*

§ 284. *Direct testimony*.—A witness may be asked to "state the terms" of an oral agreement. It is not necessary to ask him to state what was said.<sup>1</sup>

<sup>1</sup> *Frost v. Benedict, 21 Barb. (N. Y.), 247.*

§ 285. *Witness' understanding*.—A witness may be asked what he understood the parties agreed in his presence,<sup>1</sup> or what he understood they said;<sup>1</sup> or whether there was any agreement or understanding;<sup>2</sup> subject to cross-examination, and the right to strike out the answer if it expresses an opinion.<sup>3</sup> The witness cannot testify to his understanding or opinion of the effect of what was said.<sup>3</sup>

<sup>1</sup> *Printup v. Mitchell, 17 Ga., 558; s. c., 63 Am. Dec., 258.*

<sup>2</sup> *Sperry v. Baldwin, 46 Hun (N. Y.), 120.*

<sup>3</sup> *Ives v. Hamlin, 59 Mass. (5 Cush.), 534.*

§ 286. *Writing not signed*.—In what cases a writing not



signed is competent as evidence of the terms of the contract, see—

- Eager v. Crawford*, 76 *N. Y.*, 97 (draft of contract, competent as part of the *res gestæ*).  
*Freeman v. Bartlett*, 47 *N. J. L.*, 33; s. c., 20 *Reporter*, 410. (Unsigned paper made by one, and interlined and returned by the other during negotiations, admissible as part of *res gestæ*.)  
*Lathrop v. Bramhall*, 64 *N. Y.*, 365; aff'g 5 *N. Y. Supm. Ct. (T. & C.)*, 680; mem. of s. c., 3 *Hun (N. Y.)*, 394 (memorandum read over, competent to corroborate testimony to oral agreement).  
*Compare Kennedy v. Oswego & Syracuse R. R. Co.*, 67 *Barb. (N. Y.)*, 169 (holding that draft approved but not signed, was not competent because not necessary for the purpose of refreshing memory of a witness).  
*Flood v. Mitchell*, 68 *N. Y.*, 507; aff'g 4 *Hun (N. Y.)*, 813, but reversing it on other points. (Draft in which unauthorized additions were made, not competent, because thereof, and not made by common agent).  
*Mumford v. Whitney*, 15 *Wend. (N. Y.)*, 380 (copy of proposed instrument taken for the purpose of consulting others; not admissible as evidence of a contract).  
*Aguirre v. Allen*, 10 *Barb. (N. Y.)*, aff'd, on other points, in 7 *N. Y.*, 543 (broker's memorandum for his own convenience, not competent).  
*Gouverneur v. Elliott*, 2 *Hall (N. Y.)*, 211 (sealed agreement not validly executed as such).  
*Thomas v. Nelson*, 69 *N. Y.*, 118 (memorandum of agreement to lease, signed by one party only, not conclusive on him, nor excluding oral evidence).  
*S. P., Errico v. Brand*, 9 *Hun (N. Y.)*, 654.

§ 287. *Declarations of agent.*—The declarations of an agent, not made in the course of his employment as such are not competent either to show that he made a contract,<sup>1</sup> nor its terms,<sup>2</sup> nor that a contract made by him was broken.<sup>3</sup>

<sup>1</sup> *Stone v. Northwestern Sleigh Co.*, 70 *Wisc.*, 585; s. c. 36 *Northwest. Rep.*, 248.

<sup>2</sup> *Warten v. Strane*, 82 *Ala.*, 311.

*Henkel v. Trubee (Conn., 1888)*, 6 *New Eng. Rep.*, 257; s. c., 11 *Atl. Rep.*, 722.

*Compare, however, Gaither v. Clarke*, 67 *Md.*, 18; s. c., 7 *Cent. Rep.*, 438; 8 *Atl. Rep.*, 740, and *Beaver v. Taylor*, 1 *Wall. (U. S.)*, 637, admitting agent's letters as part of the *res gestæ*.

<sup>3</sup> *Memphis & V. R. Co. v. Cocke*, 64 *Miss.*, 713; s. c., 2 *Southern Rep.*, 495.

§ 288. *Previous similar transactions.*—In a conflict of evidence as to the nature or terms of a contract, the nature and terms of previous transactions between the parties are not competent as bearing on the probabilities of the transaction or question.<sup>1</sup>

But they are competent to aid in interpreting ambiguous language used by the parties.<sup>2</sup>

<sup>1</sup> *Bonyng v. Field*, 81 *N. Y.*, 159; aff'g 44 *N. Y. Super. Ct. (J. & S.)*, 581. (What was done in other transactions would not show what the contract was in reference to this one.)

*Groat v. Gile*, 51 *N. Y.*, 431 (failure of the buyer to demand on former sales, a right similar to that claimed in the present one, immaterial).

<sup>2</sup> *Richards v. Millard*, 56 *N. Y.*, 574; rev'g 1 *N. Y. Supm. Ct. (T. & C.)*, 247.

See also CONTRADICTION and CORROBORATION.

§ 289. *Different contract admissible under general denial.*—Under a general denial of a complaint alleging a contract,<sup>1</sup> or a denial that the contract was as set forth in the complaint,<sup>2</sup> the contract really made, or the part which differs from that alleged, is admissible.

<sup>1</sup> *Gove v. Wooster*, *Hill & D. Supp.*, 30 (inversion of place of covenant by mistake of scrivener).

<sup>2</sup> *Marsh v. Dodge*, 66 *N. Y.*, 533; rev'g 4 *Hun (N. Y.)*, 278. And see DENIAL.

§ 290. *With whom.*—On the question whether an oral contract was made with one person or another, it is competent to ask a witness "On the part and behalf, and for whom were the services rendered?"<sup>1</sup>

Evidence that one was reputed to be the owner of the establishment, and the other was notoriously insolvent, is not competent.<sup>2</sup>

<sup>1</sup> *Sweet v. Tuttle*, 14 *N. Y.*, 465; aff'g 10 *How. Pr. (N. Y.)*, 40 (for the question calls for a fact not a conclusion or opinion.) *Contra*: compare CREDIT.

<sup>2</sup> *Trowbridge v. Wheeler*, 1 *Allen (Mass.)*, 162.

§ 291. *Ignorance of effect.*—It is not competent for the purpose of impairing the legal effect of the terms of a con-

tract, to show that the party claiming the right was ignorant when he made the contract that it would confer such right.

*Groat v. Gile*, 51 *N. Y.*, 431 (purchase of sheep, as including wool).

§ 292. *Contract made merely to influence others*.—Whether it is competent to show that a written contract was not intended to bind the party, but only to influence third persons to whom it might be shown, see—

*Almon v. Hamilton*, 100 *N. Y.*, 527 (composition deed with secret agreement).

*Hickler v. Leighton*, 70 *N. Y.*, 610. (Receipts signed for purpose of showing to another.)

*Grierson v. Mason*, 60 *N. Y.*, 394; aff'g 3 *N. Y. Supm. Ct.*, (*T. & C.*), 185; mem. s. c., 1 *Hun* (*N. Y.*), 113.

*Willse v. Whitaker*, 22 *Hun* (*N. Y.*), 242, 244.

*Delamater v. Bush*, 63 *Barb.* (*N. Y.*), 168.

*Anthony v. Harrison*, 14 *Hun* (*N. Y.*), 198, 213; aff'd in 74 *N. Y.*, 613.

*Hutton v. Maines*, 68 *Iowa*, 650.

CONTRADICTION. [See also REBUTTAL, and TAMPERING. As to the right to corroborate after contradiction see CORROBORATION].

§ 293. Own witness.

§ 294. Usage in contradiction of alleged contract.

§ 293. *Own witness*.—One may contradict his own witness, on a question involved in the issue;<sup>1</sup> or on a question of tampering.<sup>2</sup>

<sup>1</sup> The rule prohibiting a party from impeaching his own witness only applies in three cases, viz: (1) the calling of witnesses to impeach the general character of the witness: (2) the proof of prior contradictory statements by him: and (3) a contradiction of the witness by another where the only effect is to impeach, and not to give any material evidence upon any issue in the case.

*Coulter v. American Express Co.*, 56 *N. Y.*, 585.

*Baker v. Koch*, 104 *Id.*, 394.

Approved in 22 *Am. Law. Rev.*, 455, with the qualification that proof of contradictory statements ought to be allowed. Compare *Hurley v. State* (*Ohio*, 1889), holding that such contradictory statements cannot be proved against the witness' denial of making them. In *Burgess v. N. Y. Centr. R. R. Co.*, 34 *Hun* (*N. Y.*),

233 ; s. c., more fully, 20 *N. Y. Weekly Dig.*, 249, aff'd it seems without opinion in 98 *N. Y.*, 641, contradiction as to the motives of the witness in this transaction in issue was held competent.

<sup>2</sup> *Comstock v. Handy*, 23 *N. Y. Weekly Dig.*, 547.

§ 294. *Usage in contradiction of alleged contract.*—On the question whether an alleged contract was made, evidence that its terms were unusual is incompetent if it was in writing.<sup>1</sup>

If oral, evidence of a usage known to both parties is competent.<sup>2</sup>

<sup>1</sup> *Bean v. Carleton*, 51 *Hun (N. Y.)*, 318 ; s. c., 17 *Wash. L. Rep.*, 190.

<sup>2</sup> *Miller v. Insurance Co. of North America*, 1 *Abb. N. C.*, 470.

CONVERSATION.—[See also ADMISSIONS, and TELEPHONE. As to understanding of witness, see BELIEF.]

§ 295. Interpreted conversation.

§ 298. Fact of conversation does let in substance.

296. Signs.

297. Denial and rebuttal.

§ 295. *Interpreted conversation.*—A conversation with a party ignorant of the language, being had through the medium of his friend and agent as an interpreter in his presence, that which was said to and by the interpreter in English is competent against the party.

*Wright v. Maseras*, 46 *Barb. (N. Y.)*, 521. [S. P., TELEPHONE message.]

*Contra*: *Plymouth Coal Co. v. Kommiskey*, 116 *Pa.*, 365 ; s. c., 18 *Pittsburg Leg. Int.*, 23.

§ 296. *Signs.*—Dying declarations made by pressing the hand in answer to inquiry when unable to speak, may be proved.

*Comm. v. Casey*, 11 *Cush. (Mass.)*, 417 ; s. c., 59 *Am. Dec.*, 150.

§ 297. *Denial and rebuttal.*—Testimony merely denying that any such conversation ever occurred, given in contradiction of a specified interview, does not let in evidence, in rebuttal, as matter of right, of another such interview at another time.

Marshall v. Davies, 78 N. Y., 414, 420; s. c., 58 How. Pr. (N. Y.), 231.

§ 298. *Fact of conversation does not let in substance*.—An accidental disclosure of the nature of a communication, called out by a question only intended to elicit the *fact* of such a communication, is not necessarily a ground for allowing the adverse party to call for the consequent conversation.

Winchell v. Latham, 6 Cow. (N. Y.), 682.

COPIES.—[For the distinction between sworn, certified and exemplified copies see *Abb. Tr. Ev.*, 536; also 1 *Abb. New Pr. & Forms*, 78–80. As to the form of authentication to render copy admissible see *Id.*, 727, etc.]

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| § 299. Copy proceeding from adverse party.         | § 302.—defect in authentication superseded by oath to truth of copy. |
| 300. Copy of filed or recorded instrument.         | 303. Imperfect or erroneous copy.                                    |
| 301. Effect of statute making copy equal evidence. | 304. Oral to vary.   |

§ 299. *Copy proceeding from adverse party*.—Document admissible, though a copy, if received from the adverse party to be acted on.

Moore v. Belloni, 42 N. Y. Super. Ct. (J. & S.), 184.

*So held* of copies served, of affidavits on file, when offered in evidence in the same action. Jackson v. Harrow, 11 Johns. (N. Y.), 434.

Otherwise of a copy offered as evidence in another action. Kellogg v. Kellogg, 6 Barb. (N. Y.), 116.

§ 300. *Copy of filed or recorded instrument*.—An instrument recorded under statutes allowing record, but not making the record evidence equally with the original, cannot be proved by the record, nor by a certified copy of the record without first laying a foundation for it as secondary evidence.<sup>1</sup>

An instrument filed under statutes not making a certified copy evidence cannot be proved by a certified copy, without first laying such foundation.<sup>2</sup>

<sup>1</sup> State v. Penny, 70 Iowa, 190 (false pretences, the falsity consisting in representation that there was no prior chattel mortgage on the property). The Iowa statute (Code, 3702), makes duly certified copies evidence

in all cases where the *record* would be admissible but does not make the record admissible equally with the original.

- <sup>2</sup> *Bissell v. Pearce*, 28 *N. Y.*, 252; *Fellows v. Van Hyring*, 23 *How. Pr. (N. Y.)*, 230 (chattel mortgage on file not provable by clerk's certificate to copy).

§ 301. *Effect of statute making copy equal evidence.*—A statute making a certified copy evidence equally with the original, does not preclude showing that such copy is erroneous in specified particulars in which it departs from the original.

*Campbell v. Laclede Gas Co.*, 119 *U. S.*, 445; s. c., 30 *Law. ed.*, 459; 7 *Supm. Ct. Rep'r*, 278.

§ 302. — *defect in authentication superseded by oath to the truth of copy.*—Certified copy, where authentication proves defective, may be proved as examined.

*Soc. for Prop. of the Gospel v. Young*, 2 *N. H.*, 310, 312. *S. P.*, *State v. Lynde*, 77 *Me.*, 561; s. c., 11 *New Eng. Rep.*, 290 (admitting sworn copy to show contents of record).

§ 303. *Imperfect or erroneous copy.*—A copy, if competent secondary evidence, may be received notwithstanding an error in it, if oral or other extrinsic evidence is given, as for instance by the testimony of witnesses who had read the original, stating their recollection of its contents—to show the error in the copy, and the proper correction.

*Booth v. Tiernan*, 109 *U. S.*, 205.

§ 304. *Oral to vary.*—When an instrument, the absence of which is accounted for, has been proved by secondary evidence, its contents thus shown are protected by the same rule against oral evidence to vary a writing, that the original would have been had it been produced.

*Reed v. United States Express Co.*, 48 *N. Y.*, 462.

*Campbell v. Laclede Gas Co.*, 119 *U. S.*, 445; s. c., 30 *Law. ed.*, 449; 7 *Sup. Ct. Rep.*, 278.

CORROBORATION.—[See also REBUTTAL.]

§ 305. Reason for positiveness.

306. Corroboration of hearsay.

307. — before contradiction.

308. — let in by contradiction.  
probability of truth.

§ 309. — conduct of adverse party.

310. — accounts.

311. Ex parte declarations in own  
favor.

312. Contradicting corroboration.

§ 305. *Reason for positiveness.*—A witness may be asked why he is confident he is correct; for a reason for the positiveness of relevant knowledge is relevant.

Blackwell v. Hamilton, 47 *Ala.*, N. S., 472.

Angell v. Rosenburgh, 12 *Mich.*, 241, 256.

§ 306. *Corroboration of hearsay.*—A bank officer having testified without objection to a fact occurring in the ordinary course of business under his supervision—but not within his personal knowledge, evidence of the custom and usage of the bank is competent in corroboration.

Knickerbocker Life Ins. Co. v. Pendleton, 115 *U. S.*, 339, 344 (but qualifying this by saying this does not excuse the non-production of written entries, if such exist, as to the transaction in question. For this rule see BUSINESS, § 204).

§ 307. *Corroboration before contradiction.*—The rule that a party, who has testified to a fact in issue, directly discernible by the senses, is not entitled, as of right, to fortify his testimony by proof of other facts, merely to render it more probable that what he swore to was true, where no evidence of its improbability has been adduced,<sup>1</sup> does not preclude him from putting in other evidence which may afford independent evidence of the same fact.<sup>2</sup>

<sup>1</sup> Delaño v. Smith Charities, 138 *Mass.*, 63.

<sup>2</sup> Sawyer v. Orr, 140 *Mass.*, 234. (In action on note, the nature of the consideration being in issue. *Held*, error to exclude a document which on its face suggested that it probably referred to the note.)

§ 308. *Corroboration let in by contradiction: probability of truth.*—In case of a conflict of testimony, either party may be allowed to show any incidents connected with the fact in question which tend to render probable the truth of his evidence or to render improbable that of his adversary.<sup>1</sup>

This rule allows evidence as to motive<sup>2</sup> for an act in dispute, the possession of the means of performing it,<sup>3</sup> preparations or connected conduct leading up to it,<sup>4</sup> and its consequences or results.<sup>5</sup>

The court have a discretionary power to exclude what is too remote to have a reasonable tendency for the purpose.<sup>6</sup>

And the rule does not allow proof of a fact otherwise ir-

relevant, if the only point in respect to which it tends to show the truth of the evidence, is immaterial to the issue.<sup>7</sup>

<sup>1</sup> *Platner v. Platner*, 78 *N. Y.*, 90.

*Followed* in *Nat. Ulster County Bank v. Madden*, 41 *Hun* (*N. Y.*), 113 (holding contemporaneous memorandum on check stub, competent to corroborate the testimony of the drawer of the check, even when not necessary to refresh his memory).

*People v. Sherman*, 103 *N. Y.*, 513. (Evidence that witnesses visited an office and made investigation preliminary to requesting the accused to retract libel, having been contradicted by defendant's evidence in reply, other testimony that they did visit such place, *held* competent in rebuttal.)

*People v. Wentworth*, 4 *N. Y. Crim.*, 207 (cohabitation, habit and repute are made competent on the question of marriage even in prosecution for bigamy, by conflict in direct testimony).

*People v. Bragle*, 10 *Abb. N. C.*, 300. (Criminal case. On the question whether the accused, as a public officer, made a fraudulent claim for money paid for services in burial in addition to price of coffin, *held*, that to contradict testimony that the price paid for the coffin was to include the services, it was competent for him to show a previous understanding with a third person, by which the latter was to furnish both coffin and services at a sum greater than the aggregate he alleged he had paid.)

*Contra*: *People v. Hurtado*, 63 *Cal.*, 288; s. c., 11 *Pacif. Coast L. J.*, 192. (*Held*, that evidence of the truth of a charge is not competent to corroborate evidence of a confession of it, when the truth is not in issue, but the fact of confession is only relevant as showing knowledge or belief on the part of the one to whom the confession was made. Wife's confession to husband, of having committed adultery with deceased.)

*Compare* *Edgerton v. Wolf*, 72 *Mass.* (6 *Gray*), 453, 457 (holding that where the testimony of a witness to an interview has been contradicted by another witness testifying that the interview related to a different transaction, the party has not a right to corroborate the latter witness by proof that there actually was such a transaction, for this would be a collateral question).

<sup>2</sup> *Upton v. Winchester*, 106 *Mass.*, 330. (Action for price. Denial of having agreed. Error to exclude evidence of actual value being below alleged price.)

*Knallakan v. Beck*, 47 *Hun* (*N. Y.*), 117 (conflict as to rate of wages agreed on; evidence of fair market value competent).



- Cornell *v.* Markham, 19 *Id.*, 275 (error to exclude evidence of unreasonableness of terms alleged, as tending to corroborate denial).
- Parker *v.* Coburn, 10 *Allen (Mass.)*, 82. (Vendor against purchaser for price. In a conflict of evidence as to agreed price, error to exclude deeds by which plaintiff had previously conveyed away the right to cut timber, which had reduced the actual value far below the alleged agreed price.)
- Blackburn *v.* Weisgerber, 13 *N. Y. Weekly Dig.*, 263 (in a conflict of testimony as to whether defendant suffered his property to be bought in by plaintiff at a low price for benefit of both, *held*, error to exclude evidence of a large actual value).
- Schmidt *v.* Schanzlin, 53 *N. Y. Super. Ct. (J. & S.)*, 498 (holding that in a conflict of evidence on the question whether consignments were a bailment or a sale, it is competent to show that the consignee was insolvent, because if insolvent he would be more likely to solicit consignments as agent, rather than defraud by buying with an intent not to pay).
- Jones *v.* Eaton, 27 *N. Y. Weekly Dig.*, 356; Turner *v.* Field, 13 *N. Y. State Rep.*, 12, (in conflict of testimony as to whether A. employed B., it is competent to prove that he already had a contract for the same thing with C.).
- <sup>3</sup> Pontius *v.* People, 82 *N. Y.*, 339; *aff'g* 21 *Hun (N. Y.)*, 328 (holding financial means and necessities of a person competent, on the question whether he made a large loan as sworn by him).
- S. P., Nicholls *v.* Van Valkenburgh, 15 *Hun N. Y.*, 230 (holding the like evidence competent on the question whether an alleged obligation was invalid, or whether his omission to attend to enforce it during life was mere forbearance).
- <sup>3</sup> Burlew *v.* Hubbell, 1 *N. Y. Supm. Ct. (T. & C.)*, 235 (Action on note. Making denied. Plaintiff relied on evidence that it was given for a loan to defendant when he was pressed for money to pay a certain debt. *Held*, error to exclude evidence offered by defendant that he obtained the money he needed for that purpose from another.)
- Nicholson *v.* Wafal, 70 *N. Y.*, 604; *rev'g* 6 *Hun (N. Y.)*, 655. (Holds that possession of means to make an alleged loan at the time of making it being shown beyond question, it was not error to exclude evidence of inpecuniosity during several years previous.)
- <sup>4</sup> Stone *v.* Hubbardston, 100 *Mass.*, 49 (error to exclude testimony that plaintiff was driving at a reckless speed, an eighth of a mile before he reached the place

of casualty, to corroborate a witness who had testified that he was so driving at the time of the casualty. GRAY, J.).

*Linsday v. People*, 63 *N. Y.*, 143; aff'g 5 *Hun* (*N. Y.*), 104; s. c., more fully, 67 *Barb.* (*N. Y.*), 548. (Homicide. Accomplice having testified that they removed the body on a certain night, evidence that he was away from home late that night is admissible to corroborate. So, after it has been shown that the removal was in a sleigh, evidence that the accused was seen passing in a sleigh in that direction at the time stated, is admissible.)

<sup>5</sup> *Holyoke Paper Co. v. Conklin*, 84 *Mass.* (2 *Allen*), 326. (Defendant's testimony denying the sale alleged, and stating that he had only purchased a less quantity, which was no part of that alleged to have been sold to him, *held*, properly corroborated by showing what he had done with all that he had purchased of plaintiff, and that the results were such as were inconsistent with the use of the quantity alleged.)

*Linsday v. People*, 63 *N. Y.*, 143; aff'g 5 *Hun* (*N. Y.*), 104; s. c., more fully, 67 *Barb.* (*N. Y.*), 548. (Discovery of blood stains six months after alleged homicide, competent; lapse of time being for consideration of the jury.)

*Chester v. Dickerson*, 54 *N. Y.*, 1; aff'g 52 *Barb.* (*N. Y.*), 349 [see *Whisler v. Drake*, 35 *Iowa*, 103]. (Witness having testified to receiving money, the fact that he immediately thereafter exhibited money as having been so received is competent in corroboration.)

<sup>6</sup> *Platner v. Platner*, 78 *N. Y.*, 90, 97. (*Dictum* by FOLGER, J.)

<sup>7</sup> *Gorham v. Price*, 25 *Hun* (*N. Y.*), 11. (The question at issue being whether an adverse party was in possession as tenant or as purchaser, *held*, error to allow party who had proved declaration of his adversary of readiness to pay rent and that he had money in bank to pay it with, to go on and prove the fact of the money being in bank, as corroboration of admission that he was tenant.)

*People v. Hayes*, 55 *Barb.* (*N. Y.*), 450, 457 (error to receive evidence that accomplice did pay a sum to witness, to corroborate the testimony of the accomplice that the accused paid the accomplice a large sum for the criminal act, and that the accomplice had used part of it to pay witness.) [Distinguished in *People v. Sherman*, 103 *N. Y.* 513.]

§ 209. — *conduct of adverse party*.—In a conflict of testimony it is competent to show that the adverse party had

dealt with a third person in a manner which would indicate bad faith if the fact were as he now testifies.

This is a result of the general rule as to conduct in the nature of admissions.

In *Hickler v. Leighton*, 70 N. Y., 610, an action by sub-contractor for compensation; defence, accord and satisfaction at less than sub-contract price, supported by defendant's testimony that plaintiff's work was badly done;—*Held*, that in a conflict of evidence as to this last point, the plaintiff might show that defendant had claimed and received a sum in excess of the main contract price for the whole work.

§ 310. — *accounts.*—In a conflict of testimony, accounts of the parties,<sup>1</sup> and accounts and memoranda of a person who is since deceased,<sup>2</sup> may be received as corroborating the testimony of a witness to the facts entered in the accounts, although the accounts are not competent as original evidence.

<sup>1</sup> *Charles v. Bishoff* (Pa., 1885), 1 *Central Rep.*, 618.

<sup>2</sup> *Moffat v. Moffat*, 10 *Bosw. (N. Y.)*, 468. (Testimony as to the nature and contents of documents long since destroyed being in conflict, entries in the account books of the counsel who drafted the documents relating thereto, his drafts thereof, and other papers drafted by him at the same time relative to the same subject, the counsel being deceased, are admissible as corroborative.)

§ 311. *Ex parte declarations in own favor.*—In a conflict of testimony of the parties, neither can corroborate his testimony by evidence that at or about the time in question, he stated the same facts to a third person, in the absence of adverse party.

*Wallace v. Story*, 139 *Mass.*, 115.

*Eggleston v. Columbia Turnpike Road*, 82 N. Y., 278; rev'g 18 *Hun (N. Y.)*, 146 (reversing for error in this respect).

Whether evidence of the woman's declarations to third persons about the engagement, are competent to corroborate her testimony to the fact of the man's promise to marry her, *Query*. *McPherson v. Ryan*, 59 *Mich.*, 33; s. c., 26 *Northwestern Rep.*, 321.

§ 312. *Contradicting corroboration.*—Where a witness has sought to corroborate his testimony in a conflict of evi-

dence, by stating an otherwise irrelevant fact as corroboration, it is competent to give evidence tending to establish the contrary as to that fact.

*Hickler v. Leighton*, 70 *N. Y.*, 610. (To controvert the plaintiff's evidence that defendant procured receipts to be given by representing that he wanted to show them to his partner, defendant testified that he had no partner. *Held*, competent to show by cross-examination that a third person had claimed to be his partner and sued to establish his partnership.)

CREDIT.—[For kindred topics see *INSOLVENCY*, *ACCOUNTS*, *INDUCEMENT*, *AGENCY* and *CORROBORATION*.]

§ 313. Account not conclusive.

§ 316. — one act on the faith of another.

314. Direct testimony.

317. General reputation.

§ 313. *Account not conclusive*.—A party's entry in his own account charging one person is not conclusive evidence that the transaction was really had on the credit of another.

*James v. Spaulding*, 4 *Gray (Mass.)*, 451. To the same effect, see § 49, *ACCOUNTS*.

*Meeker v. Claghorn*, 44 *N. Y.*, 349.

*Swift v. Pierce*, 13 *Allen (Mass.)*, 136 (holding that even the fact that suit was brought against the person charged on the books is not conclusive).

§ 314. *Direct testimony*.—On a question to which of two persons credit was given, in a transaction the details of which have been proved, it is not competent to ask the party as a witness in his own behalf, to state to which of such persons he gave credit.

*Beljemann v. Brooks*, 39 *Hun (N. Y.)*, 649.

*Nichols v. Kingdom Iron Co.*, 56 *N. Y.*, 618. (Error to allow plaintiff to be asked in his own behalf whether in making a demand for payment on defendant's lessee, he asked the lessee for payment as his debtor, because this called for a construction of what was said and not for the language; also error to allow a witness who did the work in part, to be asked "for whom did you do it as you supposed?")

*Merritt v. Briggs*, 57 *N. Y.*, 651 (error to allow defendant, as a witness in his own behalf, to be asked "state on whose credit the cattle were bought," as it called for the witness' conclusion or opinion; but that a general objection was unavailing. The defense was that defendant bought as a broker on the credit of another person, as plaintiff knew).

*Kellar v. Richardson*, 5 *Hun* (N. Y.), 352. (Error to allow the question, "To whom did you look for performance?" for it called merely for thoughts.)

[This rule depends not on the incompetency of a person to testify to his own intent (see INTENT) but on the irrelevancy or immateriality of the uncommunicated intent of one party to the transaction; and therefore the rule is subject to the qualification that if evidence of the intent of the adverse party has been given the party may prove his own concurrent intent. See § 315, below.]

§ 315. — *concurrent intent.*—On the question whether credit was given to defendant or a third person to whom the charge on plaintiff's books was made, it is proper, after evidence tending to show that the order was given on the authority of defendant, to ask the plaintiff's salesman, upon whose credit the goods were delivered, and to whom he looked for payment.

This was allowed for the purpose of explaining the charges on the books. *Lee v. Wheeler*, 11 *Gray* (Mass.), 236. Opinion by METCALF, J.

When such evidence has been received, if there is conflict or doubt, the question to whom was credit given is for the jury, under instructions from the court. *Maryland Coal Co. v. Edwards*, 4 *Hun* (N. Y.), 432.

So on the question whether plaintiff gave credit to the defendants as partners,—after evidence of holding out had been received, *held*, that as his belief in the existence of partnership at the time of the contract was material, he might be asked what he believed and relied on in that respect. *De Cordova v. Powter*, 16 *N. Y. State Rep.*, 1006. Opinion by DANIELS, J.

So to prove oneself to be a purchaser for value, he may testify on his own behalf that the supplies furnished after the delivery of the note were furnished on the note. For this, if matter of intent, is competent under the rule in *Seymour v. Wilson*, 14 *N. Y.*, 567; but it may rather be regarded as matter of fact under the rule in *Sweet v. Tuttle*, *Id.*, 465. *Lewis v. Rogers*, 34 *N. Y. Super. Ct. (J. & S.)*, 64, 67, 75.

*Sweet v. Tuttle*, 14 *N. Y.*, 471, sustained such a question upon the ground that it did not call for an opinion; and if it called for a conclusion deducible from other special circumstances, this should be shown by cross-examination.

§ 316. — *one act on the faith of another.*—When the inducement to the doing of an act in evidence is material the

party who did it, and even another person having adequate acquaintance with the facts, may testify that it was done on the faith of another fact; subject of course to cross-examination as to details.

*Richmondville Union Sem. v. McDonald*, 34 N. Y., 379 (testimony of vice-president and trustee of corporation, that debts were contracted on the faith of defendant's subscription, competent).

It is competent for a party to a transaction, cognizant of all the circumstances and a witness of the act, to state its purpose, subject to cross-examination. *Bank v. Kennedy*, 17 Wall. (U. S.), 19, 26 (the cashier of a bank was here allowed to testify that the purpose of the delivery of drafts was to pay for purchase of stock).

§ 317. *General reputation*.—General reputation of the insolvency and inability to pay, of one of two persons, is not alone competent for the purpose of showing whether credit was given to him or not.

*Trowbridge v. Wheeler*, 1 Allen (Mass.), 162. HOAR, J., says, if plaintiff relied on an implied contract general reputation or even knowledge would not be material unless there was holding out. If he relied on an express contract, reputation or knowledge as to solvency would not be material.

Compare CORROBORATION.

DATE.—[See also AGE, DELIVERY, TIME. As to FILING, see 1 Abb. New Pr. & F., 88-91.]

§ 318. Day of the week of a given date. § 323. Contradicting or corroborating.

319. Hearsay as evidence to fix date. 324. Part of document.

320. Refreshing memory. 325. Presumption as to date in document.

321. Collateral record and memoranda. 326. Contradicting documentary date by oral evidence.

322. Date of letter received.

§ 318. *Day of the week of a given date*.—The court may take judicial notice as to what day of the week a given day of a month and year did or will fall upon.

*Ecker v. First Natl. Bank*, 64 Md., 292; s. c., 1 Central Rep., 475, 476 (Sunday).

*Reed v. Wilson*, 41 N. J. L., 29; s. c., 8 Reporter, 338 (holding that for this purpose the court may refer to an almanac).

TABLE OF YEARS. EXCEPT LEAP YEARS.												TABLE OF MONTHS.											
1801	1807	1818	1829	1835	1846	1857	1863	1874	1885	1891		31 Jan.	28 Feb.	31 Mar.	30 April.	31 May.	30 June.	31 July.	31 Aug.	30 Sept.	31 Oct.	30 Nov.	31 Dec.
1801	1807	1818	1829	1835	1846	1857	1863	1874	1885	1891	4	7	7	3	5	1	3	6	2	4	1	2	
1802	1813	1819	1830	1841	1847	1858	1869	1875	1886	1897	5	1	1	4	6	2	4	7	3	5	1	3	
1803	1814	1825	1831	1842	1853	1859	1870	1881	1887	1898	6	2	2	5	7	3	5	1	4	6	2	4	
1805	1811	1822	1833	1839	1850	1881	1867	1878	1889	1895	2	5	5	1	3	6	1	4	7	2	5	7	
1806	1817	1823	1834	1845	1851	1862	1873	1879	1890	..	3	6	6	2	4	7	2	5	1	3	6	1	
1809	1815	1826	1837	1843	1854	1865	1871	1882	1893	1899	7	3	3	6	1	4	6	2	5	7	3	5	
1810	1821	1827	1838	1849	1855	1866	1877	1883	1894	1900	1	4	4	7	2	5	7	3	6	1	4	6	
EXPLANATION.—To ascertain any day of the week in any year of the present century, first look in the table of years for the year required, and at the right hand in the same line, and in the column headed by the month in question is a figure which indicates in which of the columns below the day of the week will be found. Thus:—To know what day of the week July 4 fell upon in the year 1878, look in the table of years for 1878, and in a parallel line under July is Fig. 1 directing to col. 1, where it is seen that July 4 fell on Thursday.											LEAP YEARS.	..	29	..	..	..	..	..	..	..	..	..	
							1804	1833	1860	1888	7	3	4	7	2	5	7	3	6	1	4	6	
							1808	1836	1864	1892	5	1	2	5	7	3	5	1	4	6	2	4	
							1812	1840	1868	1896	3	6	7	3	5	1	3	6	2	4	7	2	
							1816	1844	1872	..	1	4	5	1	3	6	1	4	7	2	5	7	
							1820	1848	1876	..	6	2	3	6	1	4	6	2	5	7	3	5	
							1824	1852	1880	..	4	7	1	4	6	2	4	7	3	5	1	3	
							1828	1856	1884	..	2	5	6	2	4	7	2	5	1	3	6	1	

1		2		3		4		5		6		7	
Monday	1	Tuesday	1	Wednesday	1	Thursday	1	Friday	1	Saturday	1	Sunday	1
Tuesday	2	Wednesday	2	Thursday	2	Friday	2	Saturday	2	Sunday	2	Monday	2
Wednesday	3	Thursday	3	Friday	3	Saturday	3	Sunday	3	Monday	3	Tuesday	3
Thursday	4	Friday	4	Saturday	4	Sunday	4	Monday	4	Tuesday	4	Wednesday	4
Friday	5	Saturday	5	Sunday	5	Monday	5	Tuesday	5	Wednesday	5	Thursday	5
Saturday	6	Sunday	6	Monday	6	Tuesday	6	Wednesday	6	Thursday	6	Friday	6
Sunday	7	Monday	7	Tuesday	7	Wednesday	7	Thursday	7	Friday	7	Saturday	7
Monday	8	Tuesday	8	Wednesday	8	Thursday	8	Friday	8	Saturday	8	Sunday	8
Tuesday	9	Wednesday	9	Thursday	9	Friday	9	Saturday	9	Sunday	9	Monday	9
Wednesday	10	Thursday	10	Friday	10	Saturday	10	Sunday	10	Monday	10	Tuesday	10
Thursday	11	Friday	11	Saturday	11	Sunday	11	Monday	11	Tuesday	11	Wednesday	11
Friday	12	Saturday	12	Sunday	12	Monday	12	Tuesday	12	Wednesday	12	Thursday	12
Saturday	13	Sunday	13	Monday	13	Tuesday	13	Wednesday	13	Thursday	13	Friday	13
Sunday	14	Monday	14	Tuesday	14	Wednesday	14	Thursday	14	Friday	14	Saturday	14
Monday	15	Tuesday	15	Wednesday	15	Thursday	15	Friday	15	Saturday	15	Sunday	15
Tuesday	16	Wednesday	16	Thursday	16	Friday	16	Saturday	16	Sunday	16	Monday	16
Wednesday	17	Thursday	17	Friday	17	Saturday	17	Sunday	17	Monday	17	Tuesday	17
Thursday	18	Friday	18	Saturday	18	Sunday	18	Monday	18	Tuesday	18	Wednesday	18
Friday	19	Saturday	19	Sunday	19	Monday	19	Tuesday	19	Wednesday	19	Thursday	19
Saturday	20	Sunday	20	Monday	20	Tuesday	20	Wednesday	20	Thursday	20	Friday	20
Sunday	21	Monday	21	Tuesday	21	Wednesday	21	Thursday	21	Friday	21	Saturday	21
Monday	22	Tuesday	22	Wednesday	22	Thursday	22	Friday	22	Saturday	22	Sunday	22
Tuesday	23	Wednesday	23	Thursday	23	Friday	23	Saturday	23	Sunday	23	Monday	23
Wednesday	24	Thursday	24	Friday	24	Saturday	24	Sunday	24	Monday	24	Tuesday	24
Thursday	25	Friday	25	Saturday	25	Sunday	25	Monday	25	Tuesday	25	Wednesday	25
Friday	26	Saturday	26	Sunday	26	Monday	26	Tuesday	26	Wednesday	26	Thursday	26
Saturday	27	Sunday	27	Monday	27	Tuesday	27	Wednesday	27	Thursday	27	Friday	27
Sunday	28	Monday	28	Tuesday	28	Wednesday	28	Thursday	28	Friday	28	Saturday	28
Monday	29	Tuesday	29	Wednesday	29	Thursday	29	Friday	29	Saturday	29	Sunday	29
Tuesday	30	Wednesday	30	Thursday	30	Friday	30	Saturday	30	Sunday	30	Monday	30
Wednesday	31	Thursday	31	Friday	31	Saturday	31	Sunday	31	Monday	31	Tuesday	31

§ 319. *Hearsay as evidence to fix dates.*—As a means of fixing the dates of any transaction you may prove by a witness that at a specified time he heard of the occurrence.<sup>1</sup>

But the conversation itself does not thereby become competent; and if its import tends to affect the issues between the parties; it is error to receive it.<sup>2</sup>

<sup>1</sup> Fisher v. People, 103 Ill., 101.

McDonald v. Savoy, 110 Mass., 49.

<sup>2</sup> N. Y. Lumber, etc. Co. v. Schneider, 15 N. Y. Civ. Pro. R., 30; s. c., 16 N. Y. State Rep., 698.

§ 320. *Refreshing memory.*—A witness, in fixing the date of a transaction, may refer to a book or diary to refresh his recollection; and may state that the entries of events were made therein at the times of their occurrence, respectively, and that he is enabled thereby to fix the date with accuracy.

But this does not of itself make the entry evidence, nor need the book be produced for the inspection of the jury.

First Nat. Bk. of Dubois v. First Nat. Bk. of Williamsport, 114 Pa., 1; s. c., 9 Eastern Rep., 123 (holding, therefore, that a deposition containing such testimony was admissible without the books referred to).

It is not essential that the paper be contemporaneous with the event. A written statement made by the witness at any time during his recollection of the date is available. Wood v. Cooper, 1 Carr. & K., 645.

That the witness in refreshing his memory as to date may be confined to the part which states the date, see Smith v. Morgan, 2 M. & Rob., 257.

§ 321. *Collateral records and memoranda* may serve as evidence of date.

Livingston v. Arnoux, 56 N. Y., 507; aff'g 15 Abb. Pr. U. S. (N. Y.), 158 (entries by attorney since deceased, in his register, pursuant to duty and against interest). S. P., Doe v. Robson, 15 East., 32; Bridgewater v. Roxbury, 54 Conn., 213; s. c., 3 New Engl. Rep., 154, 117. Coan v. Flagg, 123 U. S., 117; s. c., 31 Law. ed., 107; 8 Sup. Ct. Rep., 47 (copies of official letters by public officer verified by clerk who prepared the originals).

§ 322. *Date of letter received.*—To prove that an occurrence was at or before a given date, a witness having testified that it was at the time when he received a certain specified



letter, the letter cannot be put in evidence, for it would furnish no evidence of the time when he received it.

*Comm. v. Burns*, 89 *Mass.* (7 *Allen*), 540.

[It might be otherwise when the object was to prove the lateness of the date, for if the letter be presumed or proved to have been written at its date, the receipt of the letter would tend to fix the date at or after the date of the letter.]

§ 323. *Contradicting or corroborating.*—After a witness has fixed a date as to which he is otherwise uncertain, by referring to an occurrence at about the same time, the details of such occurrence if not relevant to the case or prejudicial to the adverse party, may be proved so far as tending to contradict or corroborate the conclusion as to the date in question.

*Blake v. Damon*, 103 *Mass.*, 199. (Not error to receive details of a transaction which has no bearing on the case, for the purpose of showing that the adverse party, who had used evidence of the transaction merely to fix a date, was mistaken in that respect.)

*Topham v. M'Gregor*, 1 *C. & K.*, 320. (Here it was held that to corroborate a witness who had fixed a date by referring to the weather at the time, a newspaper containing an article on the weather published at the time is admissible, the editor testifying as to who wrote it, and that the original manuscript is lost, and the writer testifying that he had no recollection of writing the article, but that he was then writing articles on the weather, and that the statements therein were true.)

§ 324. *Part of document.*—When a part of a document is admitted to fix a date, the whole is not thereby made evidence; but that only is admissible which relates to or modifies what has been introduced.

*Bellows v. Sowles*, 59 *Vt.*, 63; s. c., 3 *New Engl. Rep.*, 460.

§ 325. *Presumption as to date in document.*—The presumption that the date in a document is correct,<sup>1</sup> which exists unless the competency of the document depends on the date,<sup>2</sup> is a legal presumption, and conclusive in the absence of evidence to the contrary.<sup>3</sup>

<sup>1</sup> *Cowing v. Altman*, 71 *N. Y.*, 433; s. c., 27 *Am. Rep.*, 70; rev'g 5 *Hun (N. Y.)*, 556 (bank check).

Robinson *v.* Wheeler, 25 *N. Y.*, 252 (deed).

*S. P.*, as to date in account book. Sickles *v.* Mather, 20 *Wend. (N. Y.)*, 72.

See, DELIVERY.

<sup>2</sup> Smith *v.* Shoemaker, 17 *Wall. (U. S.)*, 630, 637.

Jermain *v.* Denniston, 6 *N. Y.*, 276.

Foster *v.* Beals. 21 *Id.*, 247, 250.

In Bates *v.* Prickett, 5 *Ind.*, 22; *s. c.*, 61 *Am. Dec.*, 73  
this exception was disregarded.

<sup>3</sup> St. John *v.* Am. Mut. Life Ins. Co., 2 *Duer (N. Y.)*, 419;  
*s. c.*, less fully, 12 *N. Y. Leg. Obs.*, 265; aff'd on other  
points in 13 *N. Y.*, 31.

[Compare Jackson *v.* Schoonmaker, 2 *Johns. (N. Y.)*,  
230, where mistake in date was presumed, from appar-  
ent incongruity.]

When blank, the party who seeks to enforce the instru-  
ment has the burden of showing the true date, if  
material. *Abb. Tr. Ev.*, 508.

### § 326. *Contradicting documentary date by oral evidence.*

—Whenever the time of execution of any writing becomes  
material, it may be proved by parol; not merely to supply  
an omission, where the paper is without date,<sup>1</sup> but in oppo-  
sition to the date, where it contains one.<sup>2</sup>

<sup>1</sup> Burditt *v.* Hunt, 25 *Me.*, 419; *s. c.*, 43 *Am. Dec.*, 289  
(date supplied for chattel mortgage. although statute  
required such mortgages to be in writing).

<sup>2</sup> Draper *v.* Snow, 20 *N. Y.*, 331; aff'g 6 *Duer, (N. Y.)*,  
662 (holding that the time when a contract is exe-  
cuted is no more a part of the contract than the place  
where it is executed. Both belong to that class of  
attendant circumstances which may always be  
resorted to explain and apply the terms of the con-  
tract).

So date on post mark is not conclusive. Ellis *v.* Com-  
mercial Bank, 7 *How. (U. S.)*, 294; *s. c.*, 40 *Am. Dec.*,  
63 (*dictum*).

*Contra*: where the date is made a part of the terms of  
the contract. as for instance where performance is  
deferred as depending on it. Barlow *v.* Buckingham,  
68 *Iowa* 169; *s. c.*, 26 *Northwestern Rep.*, 58.

### DEATH.—[See also CAUSE, DISEASE.]

§ 327. Mode of proving.  
328. General report.

§ 329. Order of substitution.

§ 327. *Mode of proving* and presumptions in general.

*Abb. Tr. Ev.*, 72, etc., 501; note in 23 *U. S. Law. ed.*, 314; *Davie v. Briggs*, 97 *U. S.*, 628; *Johnson v. Johnson*, 114 *Ill.*, 611; s. c., 3 *Northeastern Rep.*, 232, 233; 1 *Western Rep.*, 622; *Shriver v. State*, 65 *Md.*, 278; s. c., 3 *Central Rep.*, 230; *Re Nolting*, 43 *Hun (N. Y.)*, 456; *Bank of Louisville v. Trustees of Public Schools*, 83 *Ky.*, 219; *Cox v. Ellsworth*, 18 *Neb.*, 664; s. c., 26 *Northwestern Rep.*, 460. Paper by William G. Davies, Esq., in *Medico-Legal Papers (Third Series)*, 229.

§ 328. *General report* or belief not evidence of death.

*State v. Wright*, 70 *Iowa*, 152.

*Johnson v. Johnson*, 114 *Ill.*, 611; s. c., 3 *Northeastern Rep.*, 232; s. c., 1 *Western Rep.*, 622.

*McGrew v. State*, 13 *Tex. App.*, 340.

*Criminal Trial Brief*, 405, § 668.

*Compare State v. Marsh*, 70 *Iowa*, 759; s. c., 30 *Northwestern Rep.* 389.

*Scott v. Ratliffe*, 5 *Pet. (U. S.)*, 81.

§ 329. *Order of substitution*.—An order of substitution of a successor in interest in place of a party suggested to be deceased is prima facie evidence, in the same cause, that such death occurred.

*Stebbins v. Duncan*, 108 *U. S.*, 32; s. c., 27 *Law. ed.*, 641.  
S. P., ASSIGNMENT, §

DEFEASANCE.

§ 330. *Direct question*.—A witness may be asked how he held a deed, absolutely, or as a mortgage.

*Raynor v. Page*, 2 *Hun (N. Y.)*, 652.

For the test as to whether a conveyance from debtor to creditor is absolute or defeasible, see *Erwin v. Curtis*, 43 *Hun (N. Y.)*, 292, and cas. cit.; *Fullerton v. McCurdy*, 55 *N. Y.*, 637.

DELIVERY.—[For cognate topics see CONTRACT, ASSIGNMENT, DATE.]

§ 331. Direct testimony.

332. Contemporaneous records and entries.

333. Delivery of instrument presumed from its possession.

334. — from its record.

335. Constructive delivery.

§ 336. Rebutting delivery by proof of a condition.

337. Evidence of condition.

338. Presumption as to date.

339. — exception in case of private unauthenticated paper.

340. — undated instrument.

§ 331. *Direct testimony*.—A witness who was present may testify directly as to whether an instrument was delivered,<sup>1</sup> or possession of property was delivered;<sup>2</sup> leaving details to be called for on cross-examination.

<sup>1</sup> *Hincken v. Mut. Benf. Life Ins. Co.*, 50 *N. Y.*, 657; aff'g 6 *Lans.* (*N. Y.*), 21.

<sup>2</sup> *Collins v. Manning*, 1 *N. Y. State Rep.*, 204 (reversing for error on excluding question. Opin. by DANIELS, J.), [But a witness who has stated the facts cannot give his opinion as to whether they constituted delivery; yet if an actor in the transaction he may state the purpose of an act, see INTENT and POSSESSION.]

§ 332. *Contemporaneous records and entries*, competent to show delivery.

*Barry v. Foyles*, 1 *Pet. (U. S.)*, 311; s. c., 7 *Law. ed.*, 157 (agent's acknowledgment of a number of articles delivered at different times).

*Digby v. Stedman*, 1 *Esp.*, 328 (shop books).

*Mayor, etc. of N. Y. v. Second Ave. R. R. Co.*, 102 *N. Y.*, 512 (entries by one on information of others).

*Champneys v. Peck*, 1 *Stark.*, 404 (indorsement by clerk, since deceased).

*Owens v. Williams*, 114 *Ind.*, 179; s. c., 13 *Western Rep.*, 35; 15 *Northeastern Rep.*, 678 (statement indorsed by grantor on sealed envelope).

§ 333. *Delivery of instrument presumed from its possession*.—Possession of an executed<sup>1</sup> instrument by a party thereto<sup>2</sup> or his successor in interest claiming thereunder<sup>3</sup> is sufficient *prima facie* evidence of delivery.<sup>4</sup>

<sup>1</sup> *Abbott's Trial Ev.*, 404.

Otherwise of an instrument not countersigned when the terms of it require countersigning.

*Prall v. Mutual Protection Life Assur. Socy.*, 5 *Daly (N. Y.)*, 298; aff'd in 63 *N. Y.*, 608, without opinion.

<sup>2</sup> If there is a misnomer the burden is on the party producing the instrument to prove his identity with the one named. *Andrews v. Dyer (Me., 1886)*, 3 *New Engl. Rep.*, 229 (deed to Mercy A. produced by Melissa A.).

<sup>3</sup> Compare *Cowee v. Cornell*, 75 *N. Y.*, 91.

<sup>4</sup> Possession of tickets issued as tokens for delivery for successive loads, presumptive evidence of such deliveries. *Bumsted v. Hoadley*, 11 *Hun (N. Y.)*, 487.

§ 334. — *from its record*.—The rule that an instrument which has been recorded pursuant to statute may be re-

ceived in evidence without further proof of delivery,<sup>1</sup> rests on the presumption that a beneficial instrument has been accepted; and does not avail to charge the grantee with personal liability, where he had no personal interest to accept.<sup>2</sup>

And the presumption of delivery arising from record may be repelled by circumstantial evidence.<sup>3</sup>

<sup>1</sup> *Munoz v. Wilson*, 111 *N. Y.*, 295, 304, and *cas. cit.*

*Geismann v. Wolff*, 46 *Hun* (*N. Y.*), 289, (holding also that delivery of the bond recited in the mortgage may be inferred from record of the mortgage).

<sup>2</sup> *Gifford v. Corrigan*, 105 *N. Y.*, 223, 227, approving and aff'g with modification *Gifford v. McCloskey*, 38 *Hun* (*N. Y.*), 350.

*Knolls v. Barnhart*, 71 *N. Y.*, 474; aff'g 9 *Hun* (*N. Y.*), 443. (Fact that possession of the land, though valuable, was never delivered, sufficient.)

*Younge v. Guilbeau*, 3 *Wall.* (*U. S.*), 636; *s. c.*, 18 *Law. ed.*, 262 (—especially with ignorance on part of grantee).

§ 335. *Constructive delivery.*—In case of a deed remaining in the possession of the grantor, there must be some evidence from which it may be inferred that the parties regarded it as delivered.<sup>1</sup>

Evidence that both parties were present and the usual formalities of execution took place and the contract was to all appearance consummated without any condition or qualification annexed, is sufficient evidence of a complete and valid deed, notwithstanding it was left in the custody of the grantor.<sup>2</sup>

<sup>1</sup> *Fisher v. Hall*, 41 *N. Y.*, 416.

<sup>2</sup> 4 *Kent. Com.*, 456.

Approved in *Wallace v. Berdell*, 97 *N. Y.*, 13, 22.

The language of SPENCER, J., in *Jackson v. Phipps*, 12 *Johns.* (*N. Y.*), 418, 421, that delivery of a deed “must be either actual, by doing something and saying nothing, or else verbal, by saying something and doing nothing, or it may be both,” is approved in 1 *Thompson on Trials*. 873.

§ 336. *Rebutting delivery by proof of a condition.*—Evidence that an unsealed contract or obligation was delivered by the maker to the other party may be rebutted by showing that the delivery was upon an oral condition that the

instrument should not take effect except in a contingency which has not occurred.<sup>1</sup>

Otherwise of a sealed instrument, delivered to the grantee, or to his agent as such.<sup>2</sup>

An oral condition that the instrument after taking effect should become void or cease to have effect, is not competent as rebutting delivery.<sup>3</sup>

<sup>1</sup>*Seymour v. Cowing*, 4 *Abb. Ct. App. Dec. (N. Y.)*, 200 (notes: leading case).

*Reynolds v. Robinson*, 110 *N. Y.*, 654. (Contract for sale of merchandise, delivered on condition that reports of commercial agencies as to the buyer's responsibility should be sufficient. *Dictum*, that the evidence is subject to suspicion, and that the rule should be cautiously applied, and confined strictly to cases clearly within its reason.)

*Brewers' Fire Ins. v. Burger*, 10 *Hun (N. Y.)*, 56. (Subscription paper: evidence of previous oral agreement to subscribe on conditions, and that when paper was afterward signed, it was on those conditions, competent.)

*Biederman v. O'Connor*, 117 *Ill.*, 493; s. c., 7 *Northeastern Rep.*, 463. (Contract to sell and deliver. Evidence of condition that part payment should be made next day, competent. Conditional delivery may be proved under general denial.)

<sup>2</sup>*Worrall v. Munn*, 5 *N. Y.*, 229 (leading case).

*Van Bokkelen v. Taylor*, 62 *N. Y.*, 105; rev'g 2 *Hun (N. Y.)*, 138; s. c., 4 *N. Y.*, *Supm. Ct. (T. & C.)* 422 (holding declarations that a composition deed was executed on parol conditions, incompetent).

*Contra*: see *Jones on Const. or Interp. of Contr.*, 225, to the effect that the rule applies to sealed instruments, citing *Ford v. James*, 2 *Abb. Ct. App. Dec. (N. Y.)*, 159, 163, and other cases.

The rule as to sealed instruments does not exclude evidence to charge the obligee of a bond with notice that an obligor signed upon condition that the bond should not be delivered unless another signed also. See *Belloni v. Freeborn*, 63 *N. Y.*, 383, 1 *Abb. New. Pr. & F.*, 68; *Whitford v. Laidler*, 94 *N. Y.*, 145; rev'g 25 *Hun (N. Y.)*, 136.

<sup>3</sup>*Tower v. Richardson*, 6 *Allen (Mass.)*, 351, (notes).

*Hodge v. Security Ins. Co.*, 33 *Hun (N. Y.)*, 583, 586 (policy).

Compare *McFarland v. Sikes*, 54 *Conn.*, 250; s. c., 3 *New Engl. Rep.*, 252; s. c., 7 *Atlantic Rep.*, 408, where one charged with criminal assault and urged to settle, gave his note to be held while he should consider

the matter, stipulating that if he did not appear on the day fixed it should be held for the settlement, and if he did it should be cancelled; and he did appear. *Held*, a defense: and judgment on the note reversed.

§ 337. *Evidence of condition.*—To show that a delivery was conditional, it is not essential to prove that a condition was declared in express terms; but an intent that the delivery should be conditional may be inferred from the acts of the parties and the circumstances of the case.

*Smith v. Lynes*, 5 *N. Y.*, 41.

§ 338. *Presumption as to date.*—The general rule that the date inserted in an instrument is presumptively the date of its delivery,<sup>1</sup> applies notwithstanding it was acknowledged,<sup>2</sup> or recorded at a later date.<sup>3</sup>

This presumption may be rebutted by evidence of retention of possession,<sup>4</sup> as of actual delivery at a later date.<sup>5</sup>

<sup>1</sup> *Abb. Tr. Ev.*, 409.

*Briggs v. Fleming*, 112 *Ind.*, 313; s. c., 11 *Western Rep.*, 317; 14 *Northeastern Rep.*, 86 (chattel mortgage).

*Purdy v. Coar*, 109 *N. Y.*, 448; s. c., 12 *Central Rep.*, 629; 17 *Northeastern Rep.*, 352; *Scobey v. Walker*, 114 *Ind.*, 254; s. c., 12 *Western Rep.*, 920; 15 *Northeastern Rep.*, 674 (deed).

*Cowing v. Altman*, 71 *N. Y.*, 435; s. c., 27 *Am. Rep.*, 70; rev'g 5 *Hun (N. Y.)*, 556; and overruling, in effect, 1 *N. Y. Supm. Ct. (T. & C.)*, 494 (check).

*Taylor v. Kinlock*, 1 *Stark.*, 175 (promissory note).

*Pier v. Finch*, 24 *Barb. (N. Y.)*, 514 (railroad ticket).

*Fowler v. Merrill*, 11 *How. (U. S.)*, 375; s. c., 12 *Law. ed.*, 736 (mortgage).

This presumption does not arise as to a deed of a freehold, if there is no proof or acknowledgment, nor subscribing witness. *Harris v. Norton*, 16 *Barb. (N. Y.)*, 264; *Genter v. Morrison*, 31 *Barb. (N. Y.)*, 155.

<sup>2</sup> *People v. Snyder*, 41 *N. Y.*, 397; aff'g 51 *Barb. (N. Y.)*, 589. (*So held* of a deed, although acknowledgment was dated three years later.)

*Contra*: as to acknowledged instrument, *McIntyre v. Strong*, 48 *N. Y. Super. Ct. (J. & S.)*, 127; s. c., 63 *How. Pr. (N. Y.)*, 43.

<sup>3</sup> *Robinson v. Wheeler*, 25 *N. Y.*, 252. *Abb. Tr. Ev.*, 527, 695.

<sup>4</sup> *Wyckoff v. Remsen*, 11 *Paige (N. Y.)*, 564. And see cases reviewed in *Wallace v. Berdell*, 97 *N. Y.*, 13. *Abb. Tr. Ev.*, 695.

<sup>5</sup> *United States v. Le Baron*, 19 *How. (U. S.)*, 73; s. c., 15 *Law. ed.*, 525.

§ 339. — *exception in case of private unauthenticated paper.*—The rule that the date of a document is presumptively correct does not apply to a document which is not of a public nature nor formally authenticated, and did not proceed from the party against whom it is offered, when its competency or materiality depends upon its date; but in such case other evidence of its true date must be given, unless it is sanctioned by the rule receiving entries made in the course of duty, etc.

See § 325, DATE, and *Abb. Tr. Ev.*, 14, 49, 291; but see *Id.*, p. 2.

§ 340. — *undated instrument.*—In the case of an undated instrument, the date of an acknowledgment certified thereon,<sup>1</sup> or of the cancellation of a revenue stamp thereon,<sup>2</sup> is presumptively the date of delivery.

<sup>1</sup> *Bank of Utica v. Mersereau*, 3 *Barb. Ch. (N. Y.)*, 528, 585 (at or about the time).

<sup>2</sup> *Holbrook v. N. J. Zinc Co.*, 57 *N. Y.*, 616.

DEMAND AND REFUSAL.—[See also LETTERS.]

§ 341. Oral and written.

§ 343. Reasons for refusal.

342. — on servant.

§ 341. *Oral and written.*—An independent oral demand,<sup>1</sup> though made at the same time with delivery of a written one, is competent; but the conversation had with the mere bearer of a written demand is not competent without producing or accounting for the writing.<sup>2</sup>

<sup>1</sup> *Abb. Tr. Ev.*, 627; *Smith v. Young*, 1 *Campb.*, 439.

<sup>2</sup> *Id.*, 266; *Glenn v. Rogers*, 3 *Md.*, 312.

§ 342. — *on servant.*—Evidence of a demand on a servant in possession though he knew its rightfulness, is not sufficient unless it be shown that he was authorized to act, or instructed to refuse, or that his employer had withdrawn so as to prevent demand on himself.

*Goodwin v. Wertheimer*, 99 *N. Y.*, 149 (demand, to put assignee for benefit of creditors in the wrong).



§ 343. *Reasons for refusal.*—If one party proves a demand and refusal, the other has a right to prove the reasons which were given by him at the time for the refusal.

Bennett *v.* Burch, 1 *Den.* (N. Y.), 141.

But this does not let in a narrative of a long series of independent facts. Walrod *v.* Ball, 9 *Barb.* (N. Y.), 271.

DENIAL.—[For evidence in contradiction, or evidence to prove a negative, see CONTRADICTION CORROBORATION NEGATIVE and SURPRISE.]

§ 344. Form in pleading.  
345. General denial.

§ 345a. Specific denial.

§ 344. *Form in pleading.*—A denial may properly be either positive, or upon information and belief, or of knowledge or information sufficient to form a belief.<sup>1</sup>

Merely giving a different and inconsistent version is not sufficient as a denial of the version given in the adversary's pleading.<sup>2</sup>

<sup>1</sup> Bennett *v.* Leeds Mfg Co., 110 N. Y., 150, and note in 15 *Abb. N. C.*, 269; 14 *Id.*, 319.

<sup>2</sup> Wood *v.* Whiting, 21 *Barb.* (N. Y.), 190; Swinburne *v.* Stockwell, 58 *How. Pr.* (N. Y.), 312; Miller *v.* Wincoffer, N. Y. *Daily Reg.*, March 30, 1881.

§ 345. *General denial.*—The new procedure has superseded the rule that under the general issue anything may be proved which shows that plaintiff never had a cause of action; and a general denial now only admits evidence going to controvert something that plaintiff will be obliged to prove under his pleading in order to recover what he seeks.<sup>1</sup> But a different version may be proved under a denial, although merely alleging a different version is not equivalent to a denial.<sup>2</sup>

Illegality cannot be proved under a general denial; but the court have power on grounds of public policy to dismiss an action or overrule a defense if illegality appears in the evidence adduced in support of it.<sup>3</sup>

<sup>1</sup> See the cases collected in note in 20 *Abb. N. C.*, 342, with application of the rule to various classes of actions.

<sup>2</sup> See authorities cited under § .

<sup>3</sup> The authorities on illegality as a defense are collected in a note in 13 *Abb. N. C.*, 388, and see *Cary v. Western Union Tel. Co.*, 20 *Id.*, 333.

§ 345a. *Specific denial*.—A denial is not good as a specific denial unless it points to the allegations intended to be denied so specifically as to identify those allegations at once without argument or explanation. Reference merely by folio is bad, because folioing is changed when the record is made up.

Note in 15 *Abb. N. C.* 269, 276, 282, and see *Baylis v. Stimson*, 110 *N. Y.*, 621, *aff'g* 53 *N. Y. Super. Ct. (J. & S.)*, 225.

## DEPOSIT IN BANK.

§ 346. *Tracing*.—In order to trace funds, the making, date and amount of a deposit in bank, and the medium of paying in, as bills or checks, may be proved against the depositor and those claiming under him, by producing from the possession of the bank the deposit ticket in the handwriting of the depositor; and proving the usual course of making deposits by the testimony of any officer or clerk in the bank familiar with the course of business.

Justice BOSWORTH as Referee, in *Harrington v. Kettellas*, *N. Y.*, 1880 (*MSS.*)

DESERTION.—[See also ABANDONMENT, § 2, and INTENT.]

§ 347. *Declarations* by the wife, to prove her nonconsent.

*Bealor v. Hahn*, 117 *Pa.*, 169; s. c., 9 *Central Rep.*, 599; 11 *Atlantic Rep.*, 776; 20 *W. N. C.*, 195.

To disprove willfulness: *Hart v. McGrew (Pa.)*, 1887; 10 *Central Rep.*, 312; s. c., 10 *Atlantic Rep.*, 617.

DOMICIL.—[See also ABSENCE, and RESIDENCE.]

§ 348. *Mode of proof*.

*Abb. Tr. Ev.*, 102; *Pickering v. City of Cambridge*, 144 *Mass.*, 244; s. c., 4 *New Engl. Rep.*, 47; 10 *Northeastern Rep.*, 827.

Domicil for purposes of divorce: 10 *Abb. N. C.*, 333, note; 28 *Centr. L. J.*, 498.

Change of domicil of minor: *Lamar v. Micou*, 112 *U. S.*, 452, 470; s. c., 28 *Law. ed.*, 751; 5 *Sup. Ct. Rep.*, 221.

—of insane person: (*Mass.*, 1889), *Talbot v. Chamberlain*, 20 *Northeastern Rep.*, 305.

Change by entering public service: *Exp. Cunningham*, *L. R.* 13 *Q. B. D. (C. A.)*, 418; *s. c.*, 53 *L. J. Ch.*, 1067; *Lauderdale Peerage case*, 17 *Abb. N. C.*, 439.

DUMMY.—[For cognate topics see AGENCY, and FICTITIOUS PERSONS.]

§ 349. Bound by evidence.

§ 350. Effect on rights and liabilities.

§ 349. *Bound by evidence*.—Evidence which would be competent against the real party in interest is competent against the dummy.

*Ballou v. Ballou*, 110 *N. Y.*, 394 (judgment against husband, competent against wife, in action affecting the property standing in her name).

§ 350. *Effect on rights and liabilities*.—Transfer of stock to a dummy in view of impending liability not effective to terminate transferrer's liability.<sup>1</sup> Otherwise of a transfer made to preclude possible liability, at a time when there was no present reason to anticipate any.<sup>2</sup>

<sup>1</sup> *Nat. Bk. v. Case*, 99 *U. S.*, 628, 632; *s. c.*, 25 *Law. ed.*, 448.

<sup>2</sup> *Anderson v. Phila. Warehouse Co.*, 111 *U. S.*, 479; *s. c.*, 29 *Law. ed.*, 633; *s. c.*, 6 *Sup. Ct. Rep.*, 413.

DUTY.—[See also AGENCY, CARE, CAUSE.]

§ 351. Direct testimony. Scope of § 351a. — performance, testimony.

§ 351. *Direct testimony: Scope of duty*.—Where duty depends on the usual course of business, as showing whether a matter was or was not within the scope of one's duty, what are the general duties of a given position is matter of fact to which a witness familiar with the employment may testify.<sup>1</sup>

Otherwise where duty depends on the law or on written instructions, and is directly in question;<sup>2</sup> but a usage material as qualifying the duty may be proved if not too remote.<sup>3</sup>

<sup>1</sup> *Missouri Pacif. Ry. Co. v. Mackey*, 33 *Kans.*, 298; *s. c.*, 6 *Pacif. Rep.*, 291, 295.

<sup>2</sup> *Gratiot v. United States*, 4 *How. (U. S.)*, 80, 112; *s. c.*, 11 *Law. ed.*, 884, 899.

United States *v.* Buchanan, 8 *Hov.* (U. S.), 83; s. c., 12 *Law. ed.*, 997.

S. P., Dunlop *v.* Monroe, 7 *Cranch* (U. S.), 242; 3 *Law. ed.*, 329.

<sup>3</sup> Compare Johnston *v.* Jones, 1 *Black* (U. S.), 209; s. c., 17 *Law. ed.*, 117, with King *v.* Cope, 6 *Carr & P.*, 720.

§ 351a.—*performance*.—Where the propriety of conduct in the performance of duty depends on experience of facts not within the common knowledge of men of common education and ordinary experience, an expert may be asked what would be the duty of a person under given circumstances;<sup>1</sup> but not what was the duty in the case *in hand*, for this is the question for the jury.<sup>2</sup>

<sup>1</sup> See CARE, CAUSE, and OPINIONS.

<sup>2</sup> In Campbell *v.* Rickards, 5 *Barn. & Ad.*, 840, 846, Lord DENMAN said: "Witnesses are not receivable to state their views on matters of legal or moral obligation, nor on the manner in which others would probably be influenced, if the parties had acted in one way rather than another." See also Lord Mansfield's opinion in Carter *v.* Boehm, 3 *Burr.*, 1905, 1913, 1914.

Approved in Milwaukee & St. P. Ry. Co. *v.* Kellogg, 94 U. S., 469, 473.

## DYING DECLARATIONS.

§ 352. *Not admissible in civil cases*, even in justification of defamation by charge of crime.

Barfield *v.* Britt, 2 *Jones L.* (N. C.), 41; s. c., 62 *Am. Dec.*, 190, note.

EFFECT.—[See also CAUSE.]

§ 353. Direct testimony, injury or operation.      § 354. — expert.

§ 353. *Direct testimony: injury or operation*.—A person injured may testify to the effects of an injury or operation upon him, and what is the resulting condition,<sup>1</sup> provided that unless he be an expert, his answer states only facts of knowledge and consciousness, and not opinions, requiring professional skill to form justly.<sup>2</sup>

<sup>1</sup> Creed *v.* Hartman, 8 *Bosw.* (N. Y.), 123; aff'd on other points in 29 *N. Y.*, 591; S. P., Reeve *v.* Dennett, 145 *Mass.*, 23; s. c., 4 *New England Rep.*, 428 (teeth filled without pain).

Beckwith *v.* N. Y. Central R. R. Co., 64 *Barb. (N. Y.)*, 299. (Proper to ask, "Did the state of your health cause you to give up your business?" for it calls for a fact not an opinion.)

<sup>2</sup> *Stevens v. Rodger*, 25 *Hun (N. Y.)*, 54. (One not an expert cannot testify that the effect of a blow on his ear was to produce deafness.)

§ 354. — *expert*.—An expert may testify to probable future effects,<sup>1</sup> but so far only as relevant to the cause of action.<sup>2</sup>

<sup>1</sup> *Goodrich v. People*, 19 *N. Y.*, 574, 577 (unwholesomeness of meat consequent on disease of animal. Supreme Ct., aff'd by Ct. of Appeals without questioning this point).

*Matteson v. N. Y. Central R. R. Co.*, 35 *N. Y.*, 487 (curableness).

*Buel v. N. Y. Central R. R. Co.*, 31 *N. Y.*, 314.

<sup>2</sup> *Cumming v. Brooklyn City R. R. Co.*, 21 *Abb. N. C.*, 1; s. c., 109 *N. Y.*, 95 (holding that in *parent's* action evidence of future probable necessity of expensive surgical operation is not competent, for it can be recovered only by the child).

ELECTION (of RIGHT OR REMEDY).—[See note in 22 *Abb. N. C.*, 268.]

§ 355. Direct testimony.

§ 356. Decisive act.

§ 355. *Direct testimony*.—Where an estoppel has not been shown, nor conclusive evidence of election, the party who did the act or caused it to be done, may be asked as to the intent with which it was done.

*Sturm v. Williams*, 38 *N. Y. Super. Ct. (J. & S.)*, 325.  
*S. P., Bank v. Kennedy*, 17 *Wall. (U. S.)*, 19 (allowing witness to testify to the purpose of a transaction in which he participated).

§ 356. *Decisive act*.—Proof of any decisive act clearly manifesting the intent of the party to make a deliberate choice, establishes an irrevocable election.<sup>1</sup> But the party invoking this rule must show that the act was done with knowledge of the facts giving the right of election.<sup>2</sup>

<sup>1</sup> *Fire Assoc. of Phila. v. Rosenthal*, 108 *Pa. St.*, 474; s. c., 1 *Atlantic Rep.*, 303, 304; and cas. cit. in 22 *Abb. N. C.*, 269. [The limits of the rule are strongly put in *Becker v. Walworth*, 46 *Ohio St.*, 169; s. c., 24 *Reporter*, 184.]

Whether this conclusive effect rests upon equitable estoppel, see *Affirmative*: Equitable Foundry Co. v. Hersee, 33 Hun (N. Y.), 169 (aff'd in 103 N. Y., 25, without passing on this question).

*Negative*: Terry v. Munger, 49 Hun (N. Y.), 560; s. c., 2 N. Y. Supp., 348.

<sup>2</sup>Equitable Co-operative Foundry Co. v. Hersee, 103 N. Y., 25; S. P., ACQUIESCENCE; and see RATIFICATION.

## EMBEZZLEMENT.

§ 357. *Circumstantial evidence*.—Circumstantial evidence, though short of showing the actual appropriation of specific money is competent, and may be sufficient to show embezzlement.

Hackett v. King, 90 Mass. (8 Allen), 144.

Boston & W. Railroad v. Dana, 67 Mass. (1 Gray), 83.

N. Y. & Brooklyn Ferry Co. v. Moore, 102 N. Y., 667; s. c., with note 18 Abb. N. C., 106, rev'g 32 Hun (N. Y.), 29. (Misappropriation of ferry tolls through a long period shown by unexplained acquisition of money during that time.)

EMPLOYMENT.—[For cognate topics, see AGENCY, ABILITY, AGE, CHARACTER and DUTY.]

§ 358. *Appearance of being in service*.—Evidence that a person was actually engaged in performing labors such as were a part of the ordinary business of an employer is sufficient to go to the jury as evidence that he was acting as a servant of the latter.<sup>1</sup>

For this purpose it is not necessary to identify the person.<sup>2</sup>

<sup>1</sup>Svenson v. Atlantic Mail S. S. Co., 57 N. Y., 108 (man engaged in unloading defendant's steamer).

McCoun v. N. Y. Cent'r. etc. R. R. Co., 66 Barb. (N. Y.), 338 (man alleged to be defendant's agent was on its engine with his coat off apparently engaged in work there).

Hughes v. N. Y. N. H. R. R. Co., 36 N. Y. Super. Ct. (J. & S.), 222 (man in charge of defendant's freight car wearing a brakeman's cap and jacket).

See other cases under AGENCY, §§ 102, 103.

But testimony that a person receiving baggage, witness "supposed to be the baggage-master" of defendants, is not enough. Butler v. Hudson R. R. Co., 3 E. D. Smith (N. Y. C. P.), 571.

<sup>2</sup> *Wagner v. N. Y. Lake Erie & W. R. R. Co.*, 20 *N. Y. Weekly Dig.*, 277 (flagman).

ESTOPPEL.—[For cognate topics, see ACQUIESCENCE, AGENCY, CONSENT, ELECTION OF REMEDIES, RATIFICATION.

§ 359. Equitable estoppel.

360. Silence.

361. Estoppel by representation made to influence the proceedings.

§ 362. — by taking position before the court.

363. — by forbearing to sue.

§ 359. *Equitable estoppel*.—To establish an equitable estoppel it is not necessary to show *design* to mislead;<sup>1</sup> nor, in case of design, is it necessary to show design to mislead the particular person.<sup>2</sup>

But it must appear that the party claiming the estoppel was influenced<sup>3</sup> by the act or omission, and would be prejudiced by holding the other not estopped.<sup>4</sup>

<sup>1</sup> *Blair v. Wait*, 69 *N. Y.*, 113, 116.

<sup>2</sup> No privity is needed other than that which flows from the wrongful act and consequent injury. *Bank of Batavia v. N. Y. Lake Erie etc. R. R. Co.*, 106 *N. Y.*, 195, 200.

<sup>3</sup> It is enough, if in reliance, the party has been led to omit what he otherwise would, and might effectively, have done to protect himself. *Voorhis v. Olmstead*, 66 *N. Y.*, 113.

*Manhattan Beach Co. v. Harned*, 27 *Fed. Rep.*, 484.

*Leather Manufacturers' B'k v. Morgan*, 117 *U. S.*, 96.

Otherwise of declarations to the attorney of the party, not shown to have been communicated to the party, nor to have influenced the conduct of the attorney. *Masten v. Olcott*, 101 *N. Y.*, 152.

And of declarations to one who was a stranger when they were made, but afterward became agent for the party claiming the estoppel. *Maguire v. Selden*, 103 *Id.*, 642.

<sup>4</sup> It is not necessary that the representation should have been made in immediate connection with the act in reliance upon it. *Ahern v. Goodspeed*, 72 *N. Y.*, 108, 113.

But the conduct in reliance must have been without such delay as to give him an intervening advantage by not relying on it meanwhile. *Andrews v. Aetna Life Ins. Co.*, 85 *N. Y.*, 334.

§ 360. *Silence*.—To sustain an estoppel because of omission to speak, there must be both the specific opportunity

and the apparent duty to speak ; the party maintaining silence must have known that some one was relying thereon, and was either acting or about to act as he would not have done had the truth been told.

*Viele v. Judson*, 82 *N. Y.*, 32.

§ 361. *Estoppel by representation made to influence the proceedings.*—An admission of a fact material to plaintiff's cause of action, made by defendant to plaintiff at or before the commencement of the action, on the faith of which he elected his remedy and proceeded with the action, is conclusive on defendant in the action.

*Trustees, etc. v. Williams*, 9 *Wend. (N. Y.)*, 148.

(Declaration by defendant in ejectment for non payment of rent, and in default of property whereon to distrain, that the property on the premises did not belong to him.)

*S. P., Chapman v. Searle*, 3 *Pick. (Mass.)*, 38 (where earlier cases are reviewed).

*Dezell v. Odell*, 3 *Hill (N. Y.)*, 215. (Leading case. Receiptor to constable, held estopped as to ownership.)

But a statement communicated as one of the elements in the foundation of the claim is not necessarily conclusive against correction if there be no surprise; although the rules of variance and surprise may prevent it being corrected first at the trial. *Connecticut Mut. L. Ins. Co. v. Schwenk*, 94 *U. S.*, 593 ; 24 *L. w. ed.*, 294.

§ 362. — *by taking position before the court.*—One may, by taking a position before the court, be estopped, without having misled his adversary.

Note in 22 *Abb. N. C.*, 268, and cas. cit. on both sides of the question.

*Hughes v. Dundee Mortgage & Trust Investment Co.*, 28 *Fed. Rep.*, 40. (So held of one who having carried a judgment up in error, attempts, pending that proceeding, to plead the judgment in bar of a new action.)

But an estoppel by taking position in a litigation may be waived. *Andrews v. Aetna Life Ins. Co.*, 85 *N. Y.*, 334.

§ 363. — *by forbearing to sue.*—One is not estopped from claiming a right by not bringing a suit or special proceeding to enforce it.

*Viele v. Judson*, 82 *N. Y.*, 32.

*Thomas on Mortg. (2d ed.)*, 245.



EXCUSE.—[For other cognate topics, see EXPLAINING.]

§ 364. *Must be alleged*.—Excuse for non-performance is, in general, inadmissible under an allegation of performance.<sup>1</sup> Otherwise of excuse for not tendering where tender is not part of the contract.<sup>2</sup>

<sup>1</sup> *Oakley v. Morton*, 11 N. Y., 25.

<sup>2</sup> *Abb. Tr. Ev.*, 727.

Otherwise also of a statutory excuse if the court may take judicial notice of it. *Baxter v. Brooklyn Life Ins. Co.*, 44 *Hun* (N. Y.), 184.

EXPLANATION.—[For cognate topics, see EXCUSE, CORROBORATION, and REBUTTAL. For the right to explain omission to call witness, see *Criminal Brief*, 327, § 565. *Civil Jury Brief*, pp. 90, 91.]

§ 365. Explanation of denial.

§ 367. Fact stated not thereby proved.

366. Explanation on re-direct.

§ 365. *Explanation of denial*.—On the question whether a party made a contract or representation imputed to him it is competent to show not merely that he did not do so, but what he actually did or said in the transaction referred to, although that be irrelevant except as an explanation or corroboration of his denial.

This is a general principle, and applicable alike to the main question in issue and to matters incidentally involved.

*Marsh v. Dodge*, 66 N. Y., 533; rev'g 4 *Hun* (N. Y.), 278; s. c., 6 N. Y. *Supm. Ct. (T. & C.)*, 568. (Under general denial of making specified contract, evidence that the contract of that date was substantially different, is admissible.)

*Judge v. Judge*, 14 N. Y. *Civ. Pro. R.*, 138. (Under denial of slander defendant's version of the alleged conversation is competent, and it is error to limit the testimony to a denial of what was alleged.)

§ 366. *Explanation on re-direct*.—A witness may be allowed, on re-direct, to explain a statement called out on his cross-examination although it involves testimony to a declaration by the party calling him, which is not otherwise admissible.

*Simmons v. Havens*, 101 N. Y., 427.

§ 367. *Fact stated not thereby proved.*—A party who avails himself of his right to prove that at the time of his act he stated his reason therefor, does not by proving the statement to have been made, prove its truth, nor throw the burden of disproving its truth on the other party.

Citizens' Natl. Bk. of Davenport *v.* Importers' etc. Nat. Bk., 44 *Hun* (N. Y.), 386.

FEELINGS.—[For cognate topics see ABILITY, CAUSE, CHARACTER, HEALTH, INTENT, MALICE.]

- |   |   |
|---|---|
| § 368. Direct testimony—by the person affected. | § 371. Declarations describing feeling. |
| 369. — by observer.                             | 372. Feigning.                          |
| 370. Natural manifestation of present feeling.  | 373. Experiment.                        |

§ 368. *Direct testimony—by the person affected.*—A person may testify to his own feelings.

Huggans *v.* Fryer, 1 *Lans.* (N. Y.), 276 (fear: deeming one's self unsafe as to chattel mortgage security).

Simmons *v.* State, 61 *Miss.*, 243 (error not to allow accused to state his mental condition when he made a confession).

Armstrong *v.* Ackley, 71 *Iowa*, 76; s. c., 32 *North-western Rep.*, 180 (health, and pain suffered).

Rea *v.* Harrington, 58 *Vt.*, 181; s. c., 7 *Eastern Rep.*, 878, 883 (mental suffering: sleeplessness, inability to work, etc., caused by slander).

§ 369. — *by observer.*—A witness who had adequate opportunity<sup>1</sup> of observing the demeanor of a person, may testify directly to the state of feeling apparently manifested by that demeanor.<sup>2</sup>

<sup>1</sup> *Tompkins v. Wadley*, 3 *N. Y. Supm. Ct. (T. & C.)*, 424 (holding it not error to exclude testimony as to plaintiff's respect for defendant, when there was nothing to show that the witness had been in a situation to observe the general deportment).

In *State v. Baldwin* (*below cited*), the court lay stress upon the length of acquaintance and frequency of observation; but this concerns rather the weight than the competency of the evidence.

Compare *Messner v. People*, 45 *N. Y.*, 1, excluding testimony to the significance or expression of an outcry.

<sup>2</sup> *McKee v. Nelson*, 4 *Cow. (N. Y.)*, 355; *Abb. Tr. Ev.*, 677, 685. (Leading case; holding, in action for breach of promise, that on the question of affection, a witness may testify whether or not one of the parties was sincerely attached to the other.)

Trelawney v. Leary, 18 *Ga.*, 696 (divorce).

State v. Baldwin, 36 *Kan.*, 1; s. c., 12 *Pacif. Rep.*, 318 (allowing question whether there was anything in the appearance which made witness believe the person was in grief or dissatisfied; and testimony to being in good spirits and seeming to be happy. Also that one was nervous and showed fear).

State v. Shelton, 64 *Iowa*, 333; s. c., 20 *Northwestern Rep.*, 459 (competent to ask whether a person manifested anger).

[For notice of the distinction between this class of evidence and declarations, see *Gardner v. Klutts*, 8 *Jones L. (N. C.)*, 375.]

An ordinary witness may testify that a horse appeared to be frightened. *Comm. v. Sturtivant*, 117 *Mass.*, 122 (*dictum*).

Followed in *Yahn v. City of Ottumwa*, 60 *Iowa*, 429; abstr. s. c., in 28 *Alb. L. J.*, 334 (holding that witness might testify that horses were frightened by water being thrown upon them).

In prosecution for "disturbing" a meeting, a witness cannot testify directly that the meeting was disturbed; for this is the question for the jury. *Morris v. State*, 84 *Ala.*, 457; s. c., 4 *Southern Rep.*, 628.

As to testifying to the significance of gestures, etc., see *Criminal Tr. Brief*, 325, § 561.

§ 370. *Natural manifestations of present feeling.*—The apparently spontaneous manifestations of present feeling, by demeanor, gesture, outcry, moan, tears and the like,—as distinguished from declarations describing feelings,—are original evidence.

*Hagenlocher v. Coney Island etc. R. R. Co.*, 99 *N. Y.*, 136.

§ 371. *Declarations describing feeling.*—Declarations descriptive of present feeling, made as part of the *res gestæ* of a fact properly in evidence, are competent original evidence.<sup>1</sup>

Whether other declarations descriptive of feeling past or present are competent, is disputed.<sup>2</sup>

<sup>1</sup> *Frink v. Coe*, 4 *Greene (Iowa)*, 555; s. c., 61 *Am. Dec.*, 141, with note.

For the principles and contrasted authorities as to what the rule of the *res gestæ* lets in, see *Criminal Brief*, 312, § 540; 379, § 628.

For the strongest cases, see *Travelers Ins. Co. v. Mosley*, 8 *Wall. (U. S.)*, 397; s. c., 19 *Law. ed.*, 437,

favoring a free admission of subsequent declarations as part of the *res gestæ*; *Contra*, Bedingfield's case, 14 *Cox C.C.*, 341.

<sup>2</sup> *Affirmative*:—*Atchison, T. & S. F. R. Co. v. Johns*, 36 *Kan.* 769; *abst. s. c.*, 36 *Alb. L. J.*, 118.

*Cleveland etc. Co., v. Newell (Ind., 1885)*, 1 *Western Rep.*, 890, 894; *s. c.*, 3 *Northeastern Rep.*, 839, and *cas. cit.*

*State v. Gedicke*, 43 *N. J.* (14 *Vroom*), 86 (abortion); *s. c.*, 4 *Am. Crim. R.*, 6 (holding that declarations by the female to the physician who was examining her, of bodily feeling and symptoms of pregnancy, are admissible in evidence as part of the facts on which his opinion is formed. This is an exception to the rule as to hearsay evidence, and seems to be founded on the strong inducement she had to speak the truth, the examination being to care for her health. New trial on other ground. Citing *Barber v. Merrian*, 11 *Allen (Mass.)*, 322; *Bacon v. Charlton*, 7 *Cush. (Mass.)*, 581; 1 *Greenl. Ev.*, 102; *Wharton's Cr. Ev.*, 271).

*Negative*: *Roche v. Brooklyn City etc. R. R. Co.*, 105 *N. Y.*, 294; *s. c.* 7 *Centr. Rep.*, 702; (negligence case: statements descriptive of present feelings made long after the injury, not competent). Approved in art. in 22 *Centr. L. J.*, 509, where the conflicting cases are well reviewed.

*Compare Reed v. N. Y. Central R. R. Co.*, 45 *N. Y.*, 574; overruling, 56 *Barb. (N. Y.)*, 493. (Declarations of pain as caused by efforts at labor long after the injury, not admissible.)

It was not long ago the general practice to receive such declarations; and much may be said in favor of that rule because, if pain, for instance, though long after the injury is a relevant fact, as to show damages, a material manifestation of pain such as limping or rubbing the injured member, may be proved; and then the ordinary application of the rule of the *res gestæ* would let in what was said in the act as characterizing it, except that this could not bring in also a narrative of a past event. For that rule is not confined to the act which forms the main issue, but extends to all relevant facts.

But apparent abuses resulting from receiving descriptive declarations of pain in negligence cases, has led to a reconsideration of the rule; and the better opinion now is that a party seeking to recover damages on account of his own suffering cannot give in evidence in his own behalf, his own descriptive declarations of suffering, as distinguished from apparently spontaneous manifestations of the distress.

Leading cases under general rule ; *Caldwell v. Murphy*, 11 N. Y., 416 ; *Werely v. Persons*, 28 N. Y., 344.

Exclamations of pain, etc., competent in criminal prosecution for assault. *Comm. v. Jardine*, 143 Mass., 567 ; s. c., 3 *New Engl. Rep.*, 717.

Subsequent declarations as to previous mental state, not competent. See *Criminal Trial Brief*, 312, § 538.

§ 372. *Feigning*.—An expert who testifies to his means of knowledge may testify as to whether a person whom he examined was feigning pain.

*Chicago etc. R. R. Co. v. Martin*, 112 Ill., 16 ; abs't s. c., 32 *Alb. L. J.*, 358.

§ 373. *Experiment*.—Not error to allow a physician to thrust a pin into the flesh of a party, to demonstrate loss of sensation, though both were unsworn.

*Osborne v. City of Detroit*, 32 *Fed. Rep.*, 36.

FICTITIOUS PERSONS.—[For cognate topics see ABSENCE, DUMMY, NAMES, and NEGATIVE.]

§ 374. Declarations.

375. Inquiries.

376. —sufficiency of evidence.

377. Explanation.

§ 378. Effect of use.

379. —naming on the record.

380. —fictitious grantee.

§ 374. *Declarations* of a person active in the preparation of an instrument and made in connection with the transaction, are admissible, to show that one named as a party was a fictitious person.

*Taylor v. Crowninshield*, 5 N. Y. *Leg. Obs.*, 209 (ROBERTSON, A. V. C.).

§ 375. *Inquiries*.—To prove that there was no such person as had been supposed or pretended to be indicated by a name, it is competent for a witness to testify to his search and inquiries made for the purpose of finding such a person among persons most likely to know him if there were such an one ; and to the result.<sup>1</sup>

The witness may testify that he examined appropriate public records,—such as examining assessment rolls for the name of a person represented to be a farmer,—and found no such name there ; and it is not necessary to produce the record itself.<sup>2</sup>

<sup>1</sup> *People v. Jones*, 106 *N. Y.*, 523; aff'g 25 *N. Y. Weekly Dig.*, 541 (holding it proper to allow the witness to be asked what he did, and to state that he had conversations and could get no information; if he was not allowed to repeat the conversations).

*S. P.*, *People v. Sharp*, 63 *Mich.*, 523; s. c., 19 *Northwestern Rep.*, 168 (holding that the extent of search, etc., affects the weight, not the competency of the evidence).

But it is held error to allow the answers given to his questions to be repeated by the witness. *Wiggins v. People*, 4 *Hun (N. Y.)*, 540.

<sup>2</sup> *People v. Jones (above cited)*.

§ 376. — *sufficiency of evidence*.—Testimony to such unsuccessful inquiries is sufficient to throw upon the adverse party, the burden of showing the existence of such a person.

*Taylor v. Crowninshield*, 5 *N. Y. Leg. Obs.*, 209.

But even non-appearance on muster roll of name of one seeking to collect back pay is not conclusive. *Thompson v. Fargo*, 63 *N. Y.*, 479; aff'g 48 *How. Pr. (N. Y.)*, 93.

§ 377. *Explanation*.—Evidence of misspelling is competent by way of explanation.

*Turnbull v. Bowyer*, 40 *N. Y.*, 456; aff'g 2 *Robt. (N. Y.)*, 406.

§ 378. *Effect of use*.—One who makes an instrument in a fictitious name is bound thereby.<sup>1</sup> He may be chargeable with forgery, in case of criminal intent.<sup>2</sup>

<sup>1</sup> *David v. Williamsburg City Fire Ins. Co.*, 83 *N. Y.*, 265; rev'g 7 *Abb. N. C.*, 47, and cas. cit. (holding that plaintiff deriving title under a conveyance from his grantor to a fictitious name, followed by a conveyance executed by the same grantor in the fictitious name to plaintiff, had an insurable interest).

Compare *McDuffie v. Clark*, 39 *Hun (N. Y.)*, 166.

<sup>2</sup> *Exp. Hibbs*, 26 *Fed. Rep.*, 421 (postal money order procured in such name, and letter asking bank to collect it).

§ 379. — *naming on the record*.—A person who makes a contract in a fictitious name may be sued thereon in that name.

*Dictum* in *Petition of Snook*, 2 *Hilt. (N. Y.)*, 566, and cas. cit.

§ 380. — *fictitious grantee.*—A grant made to a fictitious person is not a genuine instrument having a legal existence, within the rule that a third person claiming thereunder can claim to be a bonafide purchaser.

Moffat *v.* United States, 112 *U. S.*, 24, s. c., 28 *Law ed.*, 623; 5 *Sup. Ct.*, 10 (so held of a government grant. Compare David *v.* Williamsburgh Fire Ins. Co. *above cited*).

Otherwise of a grant to real persons in fictitious or assumed names. Colorado Coal & Iron Co. *v.* United States, 123 *U. S.*, 307.

But the want of proof that such persons existed does not raise a presumption they were fictitious. Atty. Gen. *v.* Ruggles, 59 *Mich.*, 123 s. c., 26 *Northwestern Rep.*, 419.

## FILING.—

§ 381. *Mode of proving filing and non-filing.*

1 *Abb. New Pr. & F.*, 90; Peterson *v.* Taylor, 15 *Ga.*, 483; s. c., 60 *Am. Dec.*, 705 with note; People *v.* Hurlbutt, 44 *Barb. (N. Y.)*, 26; Sampson *v.* Buffalo etc. R. Co., 1 *N. Y. Supm. Ct. (T. & C.)*, 600; mem. s. c., 4 *Hun (N. Y.)*, 512; Jennings *v.* Newman, 52 *How. Pr. (N. Y.)*, 202; Sunderlin *v.* Wyman, 10 *Hun (N. Y.)*, 493; Briggs *v.* Waldron, 83 *N. Y.*, 582; aff'g 9 *N. Y. Weekly Dig.*, 219.

## FIXTURES.—[See also INTENT.]

§ 382. *Evidence of intent.*—The question of fixture or not being now largely a question of intent in the annexation,<sup>1</sup> circumstantial evidence is competent to show the intent; and evidence of an express agreement is not necessary.<sup>2</sup>

But the party who annexed the chattel cannot in his own favor testify directly, as to his secret uncommunicated intent.<sup>3</sup>

Nor can a witness (unless in a case proper for expert testimony) testify directly as to whether the thing could be removed without injury to the realty.<sup>4</sup>

<sup>1</sup> Potter *v.* Cromwell, 40 *N. Y.*, 287.

Voorhees *v.* McGinnis, 4 *Id.*, 278, 282.

McRea *v.* Central Nat. Bank of Troy, 66 *N. Y.*, 489; aff'g 50 *How. Pr. (N. Y.)*, 51.

<sup>2</sup> Batcheller *v.* Com. Union Ins. Co., 143 *Mass.*, 495; s. c., 3 *New Engl. Rep.*, 880, and cas. cit. (holding that it is enough to show that the parties contemplated the ownership contended for).

<sup>3</sup> *Phoenix Mills v. Miller*, 4 *N. Y. State Rep.*, 787, 792, reversing for error in receiving such testimony. LAN-  
DON, J., dissented. Compare INTENT.

<sup>4</sup> *Id.*

# FOREIGN LAW.—[See also KNOWLEDGE.]

§ 383. Judicial notice—by United States court.	§ 388. — as to construction.
384. — by state court.	389. Usage in territories acquired by U. S.
385. — laws of foreign countries.	390. Omissions and alterations.
386. Presumption.	391. Impeaching.
387. Oral evidence.	392. Judicial decisions.

§ 383. *Judicial notice—by United States court.*—The rule that the courts of the United States are bound to take judicial notice of the law of the states<sup>1</sup> is measured by the duty of a state court of the state where the trial is had. The United States court is not required to take notice of state laws which it is not required to administer as law. But in a state in which the state courts are required to notice a private or local law, the United States courts must do the same.<sup>2</sup>

<sup>1</sup> *Hanley v. Donoghue*, 116 *U. S.*, 1; s. c., 29 *Law. ed.*, 535 (holding that therefore the Supreme Court on error to a state court can notice only laws which that state court might notice).

*S. P., Beaty v. Knowler*, 4 *Pet. (U. S.)*, 152; s. c., 7 *Law. ed.*, 813; *Covington etc. Co. v. Shepherd*, 20 *How. (U. S.)*, 227; *Junction R. R. Co. v. Bank of Ashland*, 12 *Wall. (U. S.)*, 226.

<sup>2</sup> *Beaty v. Knowler (above cited)*.

§ 384. — *by state court.*—The courts of a state are bound to take judicial notice of the law (other than private acts of congress) of the United States,<sup>1</sup> and of its treaties.<sup>2</sup>

The courts of one state may,<sup>3</sup> but are not bound to<sup>4</sup> take notice of the law (other than private statutes) of any other state.

<sup>1</sup> *Laidley v. Cummings*, 83 *Ky.*, 606.

<sup>2</sup> *United States v. Rauscher*, 30 *U. S. Law. ed.*, 425.

<sup>3</sup> *Paine v. Schenectady*, 11 *R. I.*, 411; s. c., 5 *Centr. L. J.*, 517.

*Contra*: *St. Louis etc. R. R. Co. v. Weaver*, 35 *Kan.*, 412; 21 *Pacific Rep.*, 408 (refusing to take judicial notice of a peculiar common law rule prevailing in Arkansas, different from the law of Kansas; and saying that the court cannot do so).



<sup>3</sup> *Trebilcox v. McAlpine*, 46 *Hun* (N. Y.), 469.

<sup>4</sup> *Hanley v. Donoghue*, 116 (U. S.), 1; s. c., 29 *Law. ed.*, 535; 6 *Sup. Ct. Rep.*, 242.

*Eastman v. Crosby*, 90 *Mass.* (8 *Allen*), 206 (individual liability of stockholder in foreign corporation).

See, as to judicial notice of foreign law, 24 *Am. L. Reg.*, 563.

§ 385. *Laws of foreign countries.*—An American court cannot take judicial notice of the law of a foreign nation,<sup>1</sup> unless it has been recognized and promulgated by our own government.<sup>2</sup>

<sup>1</sup> *Dainese v. Hale*, 91 *U. S.*, 13; s. c., 23 *Law. ed.*, 190 (reversing judgment on demurrer, for failure to plead such law).

<sup>2</sup> *Talbot v. Seeman*, 1 *Cranch* (U. S.), 1; s. c., 2 *Law. ed.*, 15 (allowing courts of admiralty to notice public laws on a subject of common concern to all nations, when so promulgated).

§ 386. *Presumption.*—In the absence of evidence to the contrary a state court, on any point governed within the state by a common law rule, will presume that in any other state inheriting the common law system, the rule is the same.<sup>1</sup>

The court will not presume that a common law rule prevails on any subject in Louisiana or any other jurisdiction not inheriting the common law.

Nor will it presume that the law of any other state or jurisdiction is the same on any point as its own statutory law.<sup>2</sup>

<sup>1</sup> *People ex rel. Lawrence v. Brady*, 56 *N. Y.*, 182; *First Nat. Bk. of Meadville v. Fourth Nat. B'k of N. Y.*, 77 *N. Y.*, 320; s. c., 33 *Am. Rep.*, 618; rev'g 16 *Hun* (N. Y.), 332.

<sup>2</sup> *Leonard v. Columbia Steam Nav. Co.*, 84 *N. Y.*, 48; s. c., 38 *Am. Rep.*, 491. (Statute giving action for causing death.)

*Goodwin v. Young*, 34 *Hun* (N. Y.), 262 (civil damage act).

§ 387. *Oral evidence.*—In the absence of a statute as to mode of proof, oral evidence is competent to prove the law of another state, or nation, if it be not shown to have been written law;<sup>1</sup> but is not competent to prove the contents of written law.<sup>2</sup>

<sup>1</sup> *Livingston v. Maryland Ins. Co.*, 6 *Cranch* (U. S.), 272; s. c., 3 *Law. ed.*, 222.

<sup>2</sup> *Emery v. Berry*, 28 *N. H.*, 473; s. c., 61 *Am. Dec.*, 622, 626 (*dictum*; as to statute.)

*People v. Nyce*, 34 *Hun* (N. Y.), 298 (constitution).

*Contra*, see *Greenl. Ev.*, § 487.

As to mode of authentication of copy, see 2 *Abb. New Pr. & F.*, 727, etc.

§ 388. — *as to construction*.—Oral evidence as to what would in the opinion of the witness be the construction adopted by the courts of the foreign jurisdiction is not competent.

*Molson's Bank v. Boardman*, 47 *Hun* (N. Y.), 135.  
*S. P.*, *Hennessy v. Farelly*, 13 *Daly* (N. Y.), 468.

§ 389. *Usage in territories acquired by us*.—Usage and custom are competent evidence as to the law in force on this continent prior to the organization of the states or annexation to the states; and if a custom so prevailing and notorious is shown as to justify an inference that the authorities tacitly assented, it may be deemed that a prior law was repealed.

*Adams v. Norris*, 23 *How.* (U. S.), 353. [And see *USAGE*.]

§ 390. *Omissions and alterations*.—A duly authenticated copy of a statute of another state or nation is not inadmissible merely because it appears to omit some sections<sup>1</sup> or bears interlineations or erasures.<sup>2</sup>

<sup>1</sup> *Patterson v. State*, 17 *Tex. App.*, 102 (holding that in the absence of evidence to the contrary the court may presume that all the sections touching the subject are included).

<sup>2</sup> *United States v. Amedy*, 11 *Wheat.* (U. S.), 392; s. c., 6 *Law. ed.*, 502 (holding that alterations are not presumed to have been made after authentication).

§ 391. *Impeaching*.—A statute of another state duly proved cannot be impeached except in the same method as a statute of this state.

*People v. Nyce*, 34 *Hun* (N. Y.), 298 (holding therefore that a statute of another state cannot be proved unconstitutional by a judicial decision of that state without producing the constitution).

§ 392. *Judicial decisions* of another state are not conclusive evidence on a question of the constitutionality of one of its statutes.

*People v. Nyce*, 34 *Hun* (N. Y.), 298 (error to hold license under which defendant justified void merely because the law under which it was granted had been held unconstitutional in the state where it was passed).

FORGOTTEN FACT.—[For cognate topics see ACCOUNT, CONTRADICTION, CORROBORATION, NAMES, NEGATIVE, QUANTITY, TIME.]

- |   |                                       |
|---|---------------------------------------|
| § 393. Aiding memory by otherwise irrelevant inquiry. | § 396. Contemporaneous memorandum.    |
| 394. Routine or habit.                                | 397. Mention to third person.         |
| 395. Memoranda refreshing memory.                     | 398. —and entry made by third person. |

§ 393. *Aiding memory by otherwise irrelevant inquiry*.—A party may aid the memory of his own witness by inquiring as to any circumstance tending to enable him to recollect more clearly or more certainly the fact sought to be proved.

*O'Hagan v. Dillon*, 76 N. Y., 170.

Thus a witness not saying positively whether there was a light on the engine, and giving indefinite answers to questions leading up to her recollection, may be asked if she observed any change in the appearance of the engine after the accident. Such evidence is proper to ascertain her exact recollection, although the fact asked for be itself unimportant. *Tozer v. N. Y. Central etc. R. R. Co.*, 17 N. Y. *Weekly Dig.*, 370.

§ 394. *Routine or habit*.—A witness having no recollection of the details of a fact claimed to have occurred in the course of the routine of his official business, may testify to the uniform routine, and that the details of this transaction must have been in accordance with that routine or habit.

*People ex rel. Phelps v. Oyer & T.*, 83 N. Y., 436, 447, 451; aff'g *People v. Genet*, 19 *Hun* (N. Y.), 91. (Mayor's testimony to what must have induced him to countersign warrant.)

*S. P., Morrow v. Ostrander*, 13 *Hun* (N. Y.), 219.

For other illustrations see *Abb. Tr. Ev.*, 433 (inference of mailing from ordinary course of business).

§ 395. *Memoranda refreshing memory*.—See the rules in *Abb. Tr. Ev.*, 320.

And see as to reading copy of lost instrument, *Scott v. Slingerland*, 44 *Hun* (N. Y.), 254; *Singer Co. v. Riley*, 80 *Ala.*, 314. As to unauthenticated document, *Barber v. Bennett*, 58 *Vt.*, 476; s. c., 2 *New Engl. Rep.*, 215. As to contemporaneousness of memorandum, *Maxwell v. Wilkinson*, 113 *U. S.*, 656; *Palmer v. People*, 19 *Hun* (N. Y.), 372. That memorandum to refresh memory may be used as matter of right without giving evidence to identify it, *Carter v. Bowe*, 41 *Hun* (N. Y.), 516.

§ 396. *Contemporaneous memorandum*.—A memorandum made by the witness or under his eye,<sup>1</sup> at the time of<sup>2</sup> an act or event of which he had knowledge, is competent in connection with his testimony that he made the memorandum, or saw it at the time it was made, and then knew it to be true, although he has now no recollection of the facts stated in the entry.<sup>3</sup> The memorandum need not have been made in the usual course of business.<sup>4</sup>

<sup>1</sup> That it is indispensable, to entitle the witness' memorandum to be read, that he should verify the handwriting as his own, see *Gilchrist v. Brooklyn Grocers' Mfg. Assoc.*, 59 *N. Y.*, 495; aff'g 66 *Barb.* (N. Y.), 390. [But by the present practice contemporaneous memoranda verified as positively correct to the knowledge of the witness at the time the fact occurred and the entry was made, are admitted though made by a third person.]

*Bateman v. N. Y. Centr. R. R. Co.*, 47 *Hun* (N. Y.), 492. (Mem. of survey or measurement made and entered by another, but observed by the witness to have been correctly made and entered. *Held*, that he might look at the paper and state the figures as there entered. *Flint v. Kennedy*, 33 *Fed. Rep.*, 821.)

But if the memorandum sought to be used is only a copy of the one originally known to be correct, the original must be produced or accounted for. *Fisher v. Verplanck*, 23 *Hun* (N. Y.), 286 (error to receive bill made out by third person, from almanac marked by witness, neither the third person nor the almanac being produced).

<sup>2</sup> *Maxwell v. Wilkinson*, 113 *U. S.*, 656; s. c., 28 *Law. ed.*, 1037 (mem. made long after the event, excluded).

<sup>3</sup> *Ætna Ins. Co. v. Weide*, 9 *Wall.* (U. S.), 677, 681 (memorandum on leaf of ledger).

*Guy v. Mead*, 22 *N. Y.*, 462, 465.

*Owens v. State*, 67 *Md.*, 307; s. c., 8 *Cent. Rep.*, 871; 10 *Atl. Rep.*, 210.

According to *Vicksburg etc. R. R. Co. v. O'Brien*, 119 *U. S.*, 103, the memorandum cannot be received as evidence if after referring to it the witness has a distinct recollection of the material facts. In that case he must be confined to using it to refresh his memory. *Contra: Owens v. State (above cited).*

<sup>4</sup> *Ætna Ins. Co. v. Weide (above cited).*

*Morrow v. Ostrander*, 13 *Hun (N. Y.)*, 219; and see 20 *Moak Eng.*, 360.

§ 397. *Mention to third person.*—If a witness has forgotten details of a fact, he may testify that he once mentioned them to another person; and such other person may then be called to prove what was so mentioned to him.

*Shear v. Van Dyke*, 10 *Hun (N. Y.)*, 528 (amount was thus proved).

So if a conversation between two persons is proper evidence in an action against others, it may be proved by either or both of the parties between whom it took place, as when A. communicated to B. a statement made to him by C., and on his examination could not recollect its substance, C. was held to be a competent witness to prove it. *Green v. Cawthorn*, 4 *Dev. (N. C.)*, 409, 410 (civil case); and *Wharton Crim. Ev.*, § 360.

§ 398. — *and entry made by third person.*—A material ultimate fact may be proved by showing by a witness that he knew the facts in relation to the matter which is the subject of investigation, and communicated them to another person at the time, but had forgotten them; and then by the testimony of such other person to the effect that he entered at the time the facts communicated, and by the production of the book or memorandum in which the entries were made.

<sup>1</sup> *Mayor v. Second Ave. R. R. Co.*, 102 *N. Y.*, 572; s. c., 3 *Cent. Rep.*, 823.

*Payne v. Hodge*, 7 *Hun (N. Y.)*, 612; (aff'd in 71 *N. Y.*, 598, without opinion).

*Adams v. People*, 3 *Hun (N. Y.)*, 654 (aff'd in 63 *N. Y.*, 621; without discussing this point).

[For the general rule as to proving entries see *Abb. Tr. Ev.*, 319, 327; and *Bridgewater v. Roxbury*, 54 *Conn.*, 213; s. c., 3 *New Engl. Rep.*, 154, 156.]

[For a strong authority as to the necessity of personal knowledge on the part of those making the entries, see *Chaffee v. United States*, 18 *Wall. (U. S.)*, 516.]

GENUINENESS.—[See also ACKNOWLEDGMENT, AGE, HANDWRITING. and SEAL.]

§ 399. Of bank notes.  
400. Of stock.

§ 401. Several signatures.

§ 399. *Of bank notes*.—The genuineness of bank notes may be proved by witnesses acquainted with paper of that description, without proving the handwriting of the signatures, where the production of the paper is impracticable.

Johnson *v.* People, 4 *Den.* (N. Y.), 364.

United States *v.* Keen, 1 *McLean* (U. S. C. C.), 429.

That handling bank notes does not qualify witness to speak to genuineness of *signature*, see State *v.* Allen, 1 *Hawks* (N. C.); 6; s. c., 9 *Am. Dec.*, 616.

§ 400. *Of stock*.—To test the genuineness of stock certificates, the stock book, although fraudulently kept, is competent in connection with testimony tracing the various certificates.

18 *Weekly Law. Bul.*, 383.

§ 401. *Several signatures*.—Proof that some of the signatures on a statutory petition are not genuine makes a *prima facie* case of fraud, and throws on the other party the burden of proving the genuineness of the others.

State *ex. rel.* Edwards *v.* Sumter County, 22 *Fla.*, 364 (petition for license).

GIFT.—[For cognate topics, see ASSENT, DELIVERY, CONSIDERATION, and INTENT.]

§ 402. *Direct testimony*.—To meet the rule that there must be delivery and intent, the alleged donor may testify as to whether at the time of delivery he intended to part with the title and give it to the donee.

Pritchard *v.* Hirt, 39 *Hun* (N. Y.), 378, and *cas. cit.*  
See also INTENT.

[As to the necessity of proving delivery or its equivalent, see Martin *v.* Funk, 75 *N. Y.*, 134, where the earlier cases are collected; Gano *v.* Fisk, 43 *Ohio St.*, 462; s. c., 3 *Northeastern Rep.*, 533, with note; Poulain *v.* Poulain (*Ga.*, 1887), *abstr. s. c.*, 37 *Alb. L. J.*, 161; Johnson *v.* Spies, 5 *Hun* (N. Y.), 471. Art. in 28 *Centr. L. J.*, 400. Art. in 21 *Amer. Law. Rev.* (N. S.), 145.]

GOOD FAITH.—[See also INTENT, KNOWLEDGE and NOTICE.]

§ 403. Right to prove.  
404. Information.

§ 405. Belief.  
406. Reason for disregard of notice.

§ 403. *Right to prove*.—When the good faith of a party is put in issue by his adversary, he has a right to give affirmative evidence of it;<sup>1</sup> but the presumption of law will suffice in the absence of evidence.<sup>2</sup>

So one whose ownership of negotiable paper is put in issue has a right to prove that he became owner in good faith.<sup>3</sup>

<sup>1</sup> *Macon County v. Shores*, 97 *U. S.*, 272; s. c., 24 *Law. ed.*, 880.

<sup>2</sup> This is a presumption of law. *Jones v. Simpson*, 116 *U. S.*, 609; s. c., 29 *Law. ed.*, 742; 6 *Supm. Ct. Rep.*, 538. And outweighs a presumption of payment. *Louisville etc. R. Co. v. Thompson*, 107 *Ind.*, 442; s. c., 5 *Western Rep.*, 833, 837.

If the purchaser of negotiable paper for value was put on inquiry, he may be presumed, in support of his good faith, to have made the necessary inquiries. *Weeks v. Fox*, 3 *N. Y. Supm. Ct. (T. & C.)*, 354; *Miller v. Crayton, Id.*, 360. Compare *Abb. Tr. Ev.*, 716.

<sup>3</sup> *Ralls County v. Douglass*, 105 *U. S.*, 728; s. c., 26 *Law. ed.*, 957.

§ 404. *Information*.—The information on which a person acted is original evidence, whether true or false, where the question is whether he acted prudently, wisely, or in good faith.

*Werner v. Commonwealth*, 80 *Ky.*, 387; s. c., 2 *Ky. L. J.*, 169.

*S. P., Criminal Trial Brief*, 364, § 608.

*Oberlander v. Spiess*, 45 *N. Y.*, 175 (action for deceit).

*Hathaway v. Sun Mut. Ins. Co.*, 8 *Bosw. (N. Y.)*, 33, 50 (survey, as showing good faith of master).

So the fact of taking competent advice on a statement of all the facts, may be shown. *Jackson v. Mather*, 7 *Cow. (N. Y.)*, 301.

§ 405. *Belief*.—A person to whom the want of good faith is imputed in a statement shown to have been made by him, may be asked whether he then believed this statement to be correct.

*Rawls v. American Mut. Life Ins. Co.*, 27 *N. Y.*, 282; aff'g 36 *Barb. (N. Y.)*, 357.

§ 406. *Reason for disregard of notice.*—When circumstances relied on as charging a person with want of good faith by putting him on inquiry have been proved, he has a right to explain them by stating the reasons why he did not pursue inquiry.<sup>1</sup> So after stating the explanation given to him on inquiry, he may testify that he was satisfied with the explanation.<sup>2</sup>

<sup>1</sup> *Seybel v. National Currency Bk.*, 54 *N. Y.*, 288; s. c., 13 *Am. Rep.*, 583, with note; aff'g 4 *Abb. Pr. N. S.*, (*N. Y.*), 352; s. c., 2 *Daly (N. Y.)*, 383 (disregard by banker of notice of losses by theft, left at his office, explainable by his testimony that his business was so large that it was impracticable to attend to such notices).

<sup>2</sup> *Dutchess County Mut. Ins. Co. v. Hachfield*, 73 *N. Y.* 226.

GRANT.—[For cognate topics, see **ACCEPTANCE**, **DATE**, **DELIVERY**, **CONSIDERATION**.

§ 407. When presumed.

§ 408. — without actual execution.

§ 407. *When presumed.*—A grant is not to be presumed on the ground of possession and the lapse of time except when title has been shown by the party who calls for the presumption, good in substance, but wanting some essential matter to make it formally complete, and where the possession has been consistent with the fact presumed.

*Enders v. Sternbergh*, 2 *Abb. Ct. App. Dec. (N. Y.)*, 31; rev'g 52 *Barb. (N. Y.)*, 222.

§ 408. — *without actual execution.*—Possession and use sufficiently long continued, may create a presumption of a conveyance or grant even though they do not satisfy the jury that a conveyance was in point of fact executed. It is sufficient if the evidence leads to the conclusion that the conveyance might have been executed, and that its existence would be a solution of the difficulties arising from its non-execution.

*Fletcher v. Fuller*, 120 *U. S.*, 534; s. c., 30 *Law. ed.*, 759; 7 *Supm. Ct. Rep'r*, 667.

For the general rule see *Abb. Tr. Ev.*, 640, 709; *Messenger v. Uhler*, 109 *Pa. St.*, 285; s. c., 1 *Centr. Rep.*, 424; abstr. s. c., 32 *Alb. L. J.*, 476. Application of the rule to easements, *Nicholls v. Wentworth*, 100



*N. Y.*, 455; s. c., 1 *Centr. Rep.*, 737. As to conclusiveness of presumption, *House v. Montgomery*, 19 *Mo. App.*, 170; s. c., 1 *Western Rep.*, 709, 712. [For an explanation of how the rule as to this presumption arose, and the way it is in part superseded now in England by historical evidence that the right was always in the supposed grantees and their predecessors, see *Pollock's Land Laws.*]

HABIT.—[For cognate topics, see CARE, CHARACTER, and INTOXICATION.]

§ 409. Direct testimony.

§ 411. — limits of time.

410. Single instance; and repetition.

§ 409. *Direct testimony.*—A witness who has had adequate opportunities of observation may testify directly to the existence of a habit.<sup>1</sup>

<sup>1</sup> *Gallagher v. People*, 120 *Ill.*, 179; s. c., 8 *Western Rep.*, 687; 11 *Northeastern Rep.*, 335.

§ 410. *Single instance; and repetition.*—Habit may be proved by successive acts,<sup>1</sup> and a single instance is competent,<sup>2</sup> subject to the discretionary power of the court to limit the number of instances.<sup>3</sup> But when proof of habit is necessary, some degree of frequent repetition must be shown.<sup>4</sup>

<sup>1</sup> *Todd v. Rawley*, 90 *Mass.* (8 *Allen*), 51, 58.

<sup>2</sup> *United Brethren Mut. Aid Ins. Co. v. O'Hara*, 120 *Pa. St.*, 256; s. c., 17 *Ins. L. J.*, 856; 13 *Atl. Rep.*, 932 (holding it error to exclude the question,—did you ever see him under the influence of liquor? when the object was to prove intemperate habits).

*Gahagan v. Boston & L. R. R. Co.*, 83 *Mass.* (1 *Allen*), 187. (The witness may be asked if he ever saw any indication of intemperance in appearance or conduct.)

<sup>3</sup> *Comm. v. Ryan*, 134 *Mass.*, 223; s. c., 15 *Reporter*, 595. [Compare next section, n. 2.]

<sup>4</sup> *Insurance Co. v. Foley*, 105 *U. S.*, 354.

§ 411. — *limits of time.*—To show habit existing at a specified time it is competent, after having given evidence of previous acts of the kind, to give evidence of subsequent acts as proving that the previous conduct was not accidental or unusual, but frequent and the result

of a fixed habit.<sup>1</sup> It is error to exclude evidence of such acts because not within an arbitrary period,—such as one year before the time in question,<sup>2</sup>—or merely because occurring after suit brought.<sup>3</sup>

<sup>1</sup> *Todd v. Rawley*, 90 *Mass.* (8 *Allen*), 51, 58 (habit of a horse to shy).

<sup>2</sup> *Boecher v. Lutz*, 13 *Daly* (N. Y.), 28; 2 *N. Y. City Ct.*, 205, n. (ferocious habit of dog).

[Compare last section n. 3.]

*Bailey v. Belfast* (Me., 1887), 4 *New Engl. Rep.*, 763; s. c., 10 *Atl. Rep.*, 552 (habit of a horse to shy).

Otherwise of the habit of a corporation. *Davidson v. St. Paul etc. R. Co.*, 34 (*Minn.* 51; s. c., 32 *Alb. L. J.*, 379 (holding it proper to confine evidence of the negligent habit of the company, as to construction and use of its engines, to about the time of the fire complained of).

<sup>3</sup> *Mack v. Hardy*, 39 *La. Ann.*, 491; s. c., 2 *Southern Rep.*, 181 (evidence of intemperance,—in divorce,—not offered to make out cause of action, but to show continuing habit).

**HANDWRITING.**—[For kindred topics, see GENUINENESS, MARK, CORROBORATION, OPINIONS, HABIT, and NEGATIVE.

**I.—TESTIFYING AS TO ONE'S OWN § 425.** — ordinary witness cannot make comparison.  
HANDWRITING.

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| § 412. Direct testimony—authorizing signature. | 426. — testing knowledge.                            |
| 413. Writing in court on direct, not allowed.  | 427. — refreshing memory on cross-examination.       |
| 414. Upon cross-examination, when allowable.   | 428. — requiring to pick out genuine writing.        |
| 415. Concealing part of writing.               | 429. Cross-examination for purpose of contradiction. |

**II.—TESTIMONY OF NON-EXPERT AS TO KNOWLEDGE OF HANDWRITING.**

- § 416. Not secondary evidence.  
417. Means of knowledge; having seen write.  
418. Only having received communications.  
419. Having seen ancient documents.  
420. Testimony competent though not positive.  
421. Witness prepared out of court.  
422. — refreshing memory.  
423. Privilege of professional relation.  
424. Testimony of interested witness or party to handwriting of deceased, etc.

**III.—TESTIMONY OF EXPERTS (WITH OR WITHOUT THE AID OF STANDARDS OF COMPARISON).**

- § 430. Expert's direct opinion founded on comparison.  
431. Expert's testimony to peculiar characteristics.  
432. Experts cross-examined on differences.  
433. Cross-examination for purpose of contradiction.

**IV.—STANDARDS OF COMPARISON (WITH OR WITHOUT THE AID OF EXPERTS).**

- § 434. In absence of statute, document not already in the case, cannot be used for comparison.

- § 435. What is considered as in evidence.  
 436. Use of papers in the record.  
 437. Use of irrelevant documents as standards.  
 438. Writing of third person.  
 439. What law controls.  
 440. Disputed writing and standard, to be produced before comparison.  
 441. Genuineness of standards, a question for the court.  
 442. Requisite authentication of standards of comparison.  
 443. Comparison by jury or referee.
- § 444. Taking to the jury room.  
 V.—PHOTOGRAPHS, MAGNIFYING-GLASS AND SUPER-POSITION.  
 § 445. Photographic copies.  
 446. Use of magnifying glass.  
 447. Tracing and super-position.  
 VI.—CIRCUMSTANTIAL EVIDENCE AND ADMISSIONS.  
 § 448. Peculiar usages of language.  
 449. Aptitude to imitate.  
 450. Opportunity.  
 451. Condition of writer.  
 452. Admission of such an instrument.

### I.—TESTIFYING AS TO ONE'S OWN HANDWRITING.

§ 412. *Direct testimony: authorizing signature.*—On a question of the genuineness of a signature the person whose name was used may be asked directly did you sign that? Did you authorize any one to sign it?

Comm. v. Kepper, 114 Mass., 278 (question to complainant, on trial of indictment for forgery).

§ 413. *Writing in court on direct not allowed.*—The person whose writing is in dispute cannot write in court and offer the writing on his own behalf for purpose of comparison with the disputed writing.

King v. Donohue, 110 Mass., 155 (reversible error to permit such volunteer writing for comparison by jury. But *dictum* that several signatures made prior to the controversy were properly received though not otherwise relevant. Otherwise of signature made on cross examination, for purposes of contradiction).

S. P., Comm. v. Allen, 128 Mass., 26, and People v. De Kroyft, 49 Hun (N. Y.), 71, 75 (*dictum*).

United States v. Jones, 10 Fed. Rep., 469; s. c., 20 Blatch. (C. C.), 235. (*Held*, no error to refuse to permit the jury to compare the disputed writing with a copy made for the purpose by the accused in their presence: for in the United States Courts "the extent of the rule is to permit the jury to compare writings lawfully in evidence for some other purpose.")

§ 414. — *upon cross-examination when allowable.*—At the request of the adverse party, the person whose writing is in dispute, may be permitted to write in court for the purposes of comparing; and writing so made may be received in evidence against him.

*Brouner v. Loomis*, 14 *Hun* (N. Y.), 341 (holding that a signature so made *at the request of the adverse party*, or obtained on cross-examination of the witness, is admissible when offered by such adverse party for the purpose of comparison).

[In *Gilbert v. Simpson*, 6 *Daly* (N. Y.), 29, no error to refuse to compel a witness to sign in court for purpose of comparison,—the refusal was on the ground that even if compelled, the signature could not be compared by an expert, as the cases then held; but since *Loomis v. Hunt*, 75 N. Y., 288, the law is otherwise.]

*People v. De Kroyft*, 49 *Hun* (N. Y.), 71. (Signature made in court admissible at the instance of *the adverse party*, upon common law principles, even though the statute (N. Y. L. 1880, ch. 36) may be broad enough in its provisions to make the evidence competent. So held where a juror asked the witness on cross-examination to write, and the opposite party offered the signature as a part of his cross-examination, against objection.)

*United States v. Mullaney*, 32 *Fed. Rep.*, 370. (Prosecution for unlawfully writing names in registration for election. The accused testified that he did not write them.—*Held* no error to compel him on cross-examination to write them in the presence of the jury, and to allow the government to offer them in rebuttal, and the jury to compare them with the book. Such proceeding is legitimate cross-examination, and the accused cannot be allowed to say that he was thereby compelled to furnish evidence against himself.) [But see *Criminal Brief*, p. 341 §§ 591, 592.]

*Chandler v. Le Barron*, 45 *Me.*, 534. (*Held*, no error to receive, on the offer of plaintiff, a signature made in court upon cross-examination by plaintiff, and allow it to go to the jury for comparison; and the court said that by the rule in Maine it was not necessary that the standard be already in evidence.)

[*Contra*: *First Nat. Bank v. Robert*, 41 *Mich.*, 710, request that party write, excluded because it would be for comparison of an irrelevant document.]

*State v. Lurch*, 12 *Oreg.*, 99; s. c., 6 *West Coast Rep.*, 116. (Forgery; error to require accused on cross-examination to write his name for comparison, if he has not testified as to the matter of the signature in chief, for in Oregon cross-examination is strictly confined by the direct. Judgment reversed by this error.)

*Compare Hayes v. Adams*, 2 N. Y. *Supm. Ct.* (T. & C.), 593; holding it not error to permit the person whose signature is in question, to write his name upon the referee's minutes, by consent, for the purpose of comparison by the referee, and

Spence v. Lindo, 19 *Alb. L. J.*, 179, where it seems to have been held reversible error to allow a person whose handwriting is in question to write in open court upon *request of the court*, although no objection was made by either party.

§ 415. *Concealing part of writing.*—It is not competent for the purpose of testing the ability of a party to recognize his own handwriting, to show him the signature or other inadequate part of a document the rest of which is concealed, and require him to say whether it is his or not,<sup>1</sup> unless he has testified to his ability to recognize his handwriting at sight.<sup>2</sup>

<sup>1</sup> North Am. Fire Ins. Co. v. Throop, 22 *Mich.*, 161 (holding it no error to require defendant's attorney to exhibit the body of a paper to plaintiff on cross-examination before requiring him to state whether the signature thereto was his or not; for it is too severe a test to show him only the signature without the benefit of the context to enable him to identify it).

<sup>2</sup> Hardy v. Norton, 66 *Barb. (N. Y.)*, 527 (holding it discretionary and not error, where the party had denied his signature to the note sued upon, and had said on cross-examination: "I guess I can distinguish my signature whenever I see it." Here the party was required to identify signatures purporting to be his, but not in evidence and exhibited to him through a slit in an envelope which concealed the rest of the instrument. The justification of the ruling appears to be in the party's avowal of ability.

## II.—TESTIMONY OF NON-EXPERT AS TO KNOWLEDGE OF HANDWRITING.

§ 416. *Not secondary evidence.*—The fact that the testimony of the person whose writing is in dispute is available, even when he is disinterested, does not render the testimony of others who are familiar with the handwriting secondary evidence.

Lefferts v. State, 49 *N. J. L.*, 26; s. c., 7 *Eastern Rep.*, 655. (*Held*, reversible error to exclude testimony of the accused that certain complaints were signed by the prosecutor in his presence, for the judge erred in ruling that the testimony of the prosecutor was the best evidence; and as the testimony of the prosecutor was hostile, the defendant had been prejudiced. The court says: "The testimony of the man who signed

the documents, with respect to the genuineness of his signature was not of a higher grade of evidence than the testimony of a man who had seen him make such signature, or who was acquainted with his writing and deposed as to his opinion.")

Hess *v. State*, 5 *Ohio*, 5; S. C., 22 *Am. Dec.*, 767, 769. (*Held* no error to admit testimony of a bank teller acquainted with handwriting of the president and cashier, as to genuineness of bank notes even against the objection that better evidence was available as the president and cashier resided in an adjoining county; for the court said that "the objection that secondary evidence is substituted for the best, does not apply in the case, since there is not such a distinction between one whose knowledge is of his own handwriting, and the knowledge of another's on the same subject, as constitutes the former evidence of a superior degree to the latter's.")

See also *Comm. v. Pratt*, 137 *Mass.*, 98, where it was held no error to allow the prosecution to prove the defendant's signature in their own way on a trial for forgery even though the defendant on trial offered to testify.

§ 417. *Means of knowledge—having seen write.*—A witness though not an expert, is competent to testify to handwriting although he has seen the party write only once,<sup>1</sup> and then only his name,<sup>2</sup> or has seen only one specimen of his writing<sup>3</sup> and that only his name.<sup>4</sup>

<sup>1</sup> *Magee v. Osborn*, 32 *N. Y.*, 669; rev'g 1 *Robt. (N. Y.)*, 689. (Witness whose only qualification was in having seen the signer write, only on one or more occasions eight years before the trial,—*held* competent; and his testimony, without other evidence on the point, sufficient to go to the jury.)

*Jackson v. Van Dusen*, 5 *Johns. (N. Y.)*, 144. (*Held*, no error to admit the testimony of a witness who had once seen the writer sign his initials to a paper still in possession of the witness, and from the peculiar form of the letters he believed the disputed signature to be genuine.)

<sup>2</sup> *Hammond v. Varian*, 51 *N. Y.*, 398. (*Dictum*, that it is no error to admit the testimony of a witness who has seen the person write his name once.)

To the same effect, *dicta* in *Stevens v. Seibold*, 5 *N. Y. State Rep.*, 258, 260, and in *Rogers v. Ritter*, 12 *Wall. (U. S.)*, 317.

<sup>3</sup> *Hynes v. McDermott*, 82 *N. Y.*, 41-52. (*Dictum*, that would be error to reject as incompetent, the testi-

mony of a witness who had seen only one genuine piece of the handwriting of the person whose handwriting is in dispute.)

- <sup>4</sup>Clapp v. Betts, 12 *N. Y. Weekly Dig.*, 341. (Witness as maker of promissory notes mailed them to the person whose indorsement was in question and requested his indorsement. In due time they were returned with his name indorsed thereon, and witness thought that such indorsement was the signature of such person. Error to hold insufficient to go to the jury; and non-suit was reversed.)

§ 418. — *only having received communication.*—A witness, though not an expert, is competent to testify to handwriting, although his only knowledge of it is derived from having seen communications purporting to be from the alleged writer, which have been received and acted upon as such in the ordinary course of business.

Armstrong v. Fargo, 8 *Hun (N. Y.)*, 175. (*Held*, that testimony of witness that he had seen a large number of receipts which had been signed by an agent of an express company, and from the knowledge thus derived he believed the signature to the receipt to be the agent's, although he had never seen him write, was sufficient proof.)

Baker v. Squier, 1 *Hun (N. Y.)*, 448; s. c., 3 *N. Y. Supm. Ct. (T. & C.)*, 465. (That thousands of chemists' certificates of quality of goods had been acted upon by the witness and received as genuine in the trade, though no other evidence was adduced,—*held*, no error to admit, as sufficient to go to the jury on the question of genuineness.)

Robinson Consolidated Mining Co. v. Craig, 4 *N. Y. State Rep.*, 478; s. c., 25 *N. Y. Weekly Dig.*, 512. (*Held*, no error to allow witness not having seen the person write, to state that he knew his handwriting from having read his various communications to the company of which the witness was vice-president, and which had been acted upon by the company as having come from him.)

Stevens v. Seibold, 5 *N. Y. State Rep.*, 258, 260. (*Dic-tum*, that if a witness "has not seen the party write he must have seen genuine specimens of his handwriting, and the fact that they were genuine must be proved. It is not enough that they purport to come from the person whose handwriting is in question (Cunningham v. Hudson River Bank, 21 *Wend. (N. Y.)*, 557). The authenticity of the specimens may be established by presumptive as well as direct evi-

dence; as, when persons are directed to a particular person or business, and answers are received in due course, fair inference arises that the answers were written by the person from whom they purport to come.")

§ 419. — *having seen ancient documents.*—A witness, though not an expert, is competent to testify to handwriting so old that no witnesses can swear to having seen the parties write, if he has become familiar with their signatures by inspecting other ancient writings, bearing such signatures, and which have been treated and regularly preserved as authentic.

Jackson *v.* Brooks, 8 *Wend. (N. Y.)*, 426, aff'd without opinion in 15 *Id.*, 111. The other ancient writings from which the witness here derived his acquaintance were title deeds belonging to the witness.

Jones *v.* Huggins, 1 *Dev. L. (N. C.)*, 223; s. c., 17 *Am. Dec.*, 567, to same effect in regard to ancient maps or plans of survey, where the witness' knowledge of the surveyor's handwriting was derived from inspecting many ancient plots of surveys attached to grants and purporting to have been made by such surveyor, and so treated. Case reversed on other grounds.

§ 420. *Testimony competent though not positive.*—The testimony of a witness to handwriting, is not incompetent merely because he testifies that he thinks it genuine but will not swear positively.

Stevens *v.* Seibold, 5 *N. Y. State Rep.*, 258 (where a witness was familiar with his brother's signature five years ago, but had not seen it in a few years, but thought he knew his signature, and that the one in question looked like it, and should judge it was his, and that was all he could swear, as it might be some one else's for all he knew,—held competent to testify as to genuineness of the signature, but the case was reversed on other grounds).

Comm. *v.* Andrews, 143 *Mass.*, 23; s. c., 3 *New Eng. Rep.*, 109; 8 *Northeast Rep.*, 643. (*Held*, no error to admit testimony of witness familiar with handwriting of defendant that he "thought the signatures" were the defendant's, although on cross-examination he could "not swear to the signatures," for this went to the weight, not to the competency, of the evidence.)

State *v.* Stair, 87 *Mo.*, 268; s. c., 1 *Western Rep.*, 765. (*Held*, no error to admit a paper as sufficiently proved to go to the jury where a witness (who had seen the



alleged writer make two or three notes and sign his name to another, testified that he was "not positive but should judge it was" such person's handwriting. The court said: "If the witness has the proper knowledge of the handwriting, he may declare his belief.")

§ 421. *Witness prepared out of court.*—Knowledge derived by the witness, out of court and after the controversy arose, from examination of genuine writings or seeing the person write, the specimens being chosen or obtained in quest of evidence at the instance of the party calling the witness, does not qualify him to testify to the handwriting; and allowing him to do so upon knowledge obtained by such means, is error.

*Hynes v. McDermott*, 82 N. Y., 41, 53. (*Dictum*, that if genuine writings are made or chosen by the party calling the witness, so as to prepare him out of court, his testimony, based on the result of such inspection, cannot be received.)

*Reese v. Reese*, 9 Pa. St., 89; s. c., 35 Am. Rep., 634. (*Held*, that a witness having no knowledge of a handwriting other than that derived from seeing the person write several times for the express purpose, is incompetent to give an opinion thereof.)

*Hynes v. McDermott*, (*above cited*). (*Held*, no error to exclude as incompetent, a person employed as a detective to secure evidence from the opposite side, and obtaining his only knowledge of genuine handwriting out of court while thus acting; as such evidence is objectionable as being testimony created *post litem motam*.) [This decision was based on the law prior to L. 1880, ch. 36.]

§ 422. — *refreshing memory.*—A witness who shows himself acquainted with defendant's handwriting may, before, or at the trial, refer to papers in his possession which he knows to be in defendant's handwriting, to refresh his memory, before testifying.

*Thomas v. State*, 103 Ind., 419; s. c., 1 Western Rep., 309. (*Held*, no error to permit a witness to do so on direct examination.) See § 427 (*below*), as to refreshing memory on cross-examination.

§ 423. — *privilege of professional relation.*—The privilege of confidential communications does not render attorney or counsel incompetent to testify to his client's handwriting.

*Holthausen v. Pondir*, 55 *N. Y. Super. Ct. (J. & S.)*, 73; s. c., 18 *N. Y. State Rep.*, 360.

*Mercown v. Jewett*, 120 *Mass.*, 215. (*Held*, no error to permit the plaintiff to call defendant's counsel and ask him if signatures on back of a promissory note were the defendant's sued as indorsee, where he had been their counsel for two years, and had seen them write their names four or five times. No opinion was delivered except a memorandum that the evidence was properly admitted; but the trial judge in overruling the objection of privilege to the question, said that the witness was not required to disclose any matters of confidential communication, or to base his opinion upon any statements of the defendants to him as counsel.)

This is on the ground that his knowledge is not necessarily derived from confidential communications. The principle is the same as the familiar rule that the fact of the relation of the attorney and client is not privileged. But knowledge of the handwriting of a communication between the attorney and client would be privileged if the communication was. In other words the privilege does not exclude acquaintance with handwriting of a client though acquired after retainer, unless the questions to the attorney are pushed far enough to show that he knew nothing but what his client had communicated to him. *Johnson v. Daverne*, 19 *Johns. (N. Y.)*, 134; s. c., 10 *Am. Dec.*, 198. (The testimony in this case as stated in the report is not quite clear on this point.)

The same principles doubtless apply to the privilege arising from other professional relations.

For the New York Statute, see *N. Y. Code Civ. Pro.*, §§ 833-836.

§ 424. *Testimony of interested witness or party to handwriting of deceased, etc.*—The rule disqualifying a party or interested witness from testifying to a personal transaction or communication with the deceased, etc.,<sup>1</sup> does not disqualify from testifying as to his own handwriting, on an instrument to which the deceased was a party,<sup>2</sup> nor as to that of the deceased,<sup>3</sup> unless the testimony involves an incident of a personal transaction or communication to which the statute does apply.<sup>4</sup>

<sup>1</sup> For this rule, see *Abb. Tr. Ev.*, 67, etc.

<sup>2</sup> *Hussey v. Kirkham*, 95 *N. C.*, 63 (*dictum*).

*Saratoga County Bank v. Leach*, 37 *Hun (N. Y.)*, 336. (*Held*, reversible error to exclude the alleged maker's

denial of the signature to note after death of payee who indorsed to plaintiff.)

*Evans v. Ellis*, 22 *Hun* (N. Y.), 460. (*Held*, reversible error to exclude the question: "Is that your signature?" No opinion reported.)

<sup>3</sup> *Simmons v. Havens*, 101 N. Y., 427, 433 (allowing grantee to testify that she had the deed in her possession and that the signature was that of deceased. Objection overruled because it did not appear from whom she received the deed nor did the testimony involve any personal transaction, etc.).

<sup>4</sup> *Abb. Tr. Ev.*, 69, note.

*Garvey v. Owens*, 37 *Hun* (N. Y.), 498. (*Held* reversible error to allow the witness to testify to the genuineness of the signatures of himself and the deceased.) [Here the testimony apparently implied an interview.]

*Howell v. Manwaring*, 3 N. Y. *State Rep.*, 454 (holding it not error to exclude questions as to whether he saw the assignment by the deceased signed, and whose signature it was).

Compare *Saratoga County Bank v. Leach*, 37 *Hun* (N. Y.), 336, and *Evans v. Ellis*, 22 *Hun* (N. Y.), 460, in last note (*above*).

§ 435. — *ordinary witness cannot make comparison.*—

Both under the statute as to comparison, and in the absence of statute, a witness not an expert is incompetent to express an opinion on a comparison of handwriting.

*McKay v. Lasher*, 42 *Hun* (N. Y.), 270. (*Held* reversible error to allow it, under L. 1880, ch. 36, which does not change the law in this respect.)

*Mixer v. Bennett*, 70 *Iowa*, 329. (To same effect under Iowa Code.)

[*Contra*: *Hall & Co. v. Flanagan*, 18 S. C., 506. *Held* no error to admit opinion of one not a professional expert where the direct proof was doubtful.]

*Bell v. Brewster*, 44 *Ohio St.*, 690; s. c., 10 *Northeastern Rep.*, 679 (*dictum*), citing *Bragg v. Colwell*, 19 *Oh. St.*, 407; *Pavey v. Pavey*, 30 *Id.*, 600, and *Calkins v. State*, 14 *Id.*, 222.

§ 426. — *testing knowledge.*—To ascertain the knowledge of a witness as to handwriting, it is proper to ask him as to the general character and importance of the other writings he saw signed, though the contents may be irrelevant;<sup>1</sup> and any proper test may be allowed in the discretion of the court.<sup>2</sup>

<sup>1</sup> *Bardin v. Stevenson*, 75 *N. Y.*, 164. (Defense of forgery, to action on note: *Held*, no error, because although details as to contents would be incompetent, yet their general importance as imposing upon, or releasing a pecuniary obligation to the signer "might well call more particular attention of the witness to them" than if unimportant, and thus be relevant to the witness' knowledge.)

<sup>2</sup> In *Hardy v. Norton*, 66 *Barb. (N. Y.)*, 527 (an action upon a note; defendant had denied that the signature thereto was his, and upon cross-examination had said: "I guess I can distinguish my signature whenever I see it;"—*held*, discretionary to permit him to be asked whether the signatures purporting to be his to seven different papers not in evidence were his, even though successively shown to him through a slit in a large envelope entirely concealing the rest of the paper; for the only object was to test his knowledge).

*Bank of Commonwealth v. Mudgett*, 44 *N. Y.*, 514. (Where a witness had testified that he knew the person's handwriting in dispute, and that the indorsement to the note sued on, was genuine:—*held*, no error to ask him on cross-examination: "In the course of your official duties [as assistant appraiser] are you called upon to pass and act upon the signature of the deputy collector" [defendant] and "how many times a day?" for it was material to show the means and extent of the knowledge of the witness. But *held*, also, proper to exclude, on cross-examination of a witness who testified that it was his impression that the signature in dispute was genuine, the inquiry "would you take it against his denial of the signature?" for this was mere speculation and vague belief.)

§ 427. — *refreshing memory on cross-examination.*—Independent of any rule allowing use of irrelevant papers as standards of comparisons, confessedly genuine writing may be shown to a witness on cross-examination, to refresh his memory in order to have him correct his testimony in respect to the disputed writing.

*Bank v. Armstrong*, 66 *Md.*, 113; s. c., 6 *Atlantic Rep.*, 584. (*Held*, reversible error to refuse to allow witnesses testifying that a signature was not genuine, to be asked on cross-examination, to refresh their memory by looking at a letter admitted to be genuine, but not relevant, and then state whether they still were of opinion that the disputed signature was not genuine, where they had testified that they were familiar with the defendant's handwriting, and that it was

heavier and larger than the one in question. The court said that to have allowed this "would no wise have infringed the rule which is well settled in this State against proof of handwriting by comparison of hands.")

§ 428. — *requiring to pick out genuine writing.*—A witness cannot, on cross-examination, be required to pick out the genuine signatures from a number of specimens, in order to test his knowledge.

*Massey v. Farmer's Nat. B'k.*, 104 Ill., 327. (*Held*, no error on cross-examination to exclude the question whether the witness could point out the genuine signatures, if any, among a list of sixteen written on a slip to test the knowledge of the witness who had testified that he had seen the party write some years before, and that it was his impression that the signature to the note in question was genuine.) But compare § 88, AGE; and IDENTITY.

§ 429. *Cross-examination for purpose of contradiction.*—A witness to handwriting cannot be asked on cross-examination his opinion as to a document not relevant to the issue,<sup>1</sup> and not already received as a standard of comparison<sup>2</sup> for the purpose of contradicting his answers.

<sup>1</sup> *Van Wyck v. McIntosh*, 14 N. Y., 439.

*Bank of Commonwealth v. Mudgett*, 44 N. Y., 514, 523.

*United States v. Chamberlain*, 12 Blatch. (C. C.), 390.

*Rose v. First Nat. Bank of Springfield*, 91 Mo., 399: s. c., 8 Western Rep., 624. (Here issue being whether a check was forged, the court, over objection, permitted to be presented to the bank cashier upon cross-examination, two checks upon which were written the alleged forged name; and subsequently a witness in rebuttal testified that he had written the name at the trial. *Held*, reversible error, as the rule which excludes comparison with extrinsic papers and signatures. is substantially the same in direct and cross-examination.)

*Tyler v. Todd*, 36 Conn., 218 (citing *Bacon v. Williams*, 13 Gray (Mass.), 525, to the same effect).

<sup>2</sup> This qualification is not stated by the authorities.

### III.—TESTIMONY OF EXPERTS (WITH OR WITHOUT THE AID OF STANDARDS OF COMPARISON).

§ 430. *Expert's direct opinion founded on comparison.*—An expert, although having no other knowledge of the hand-

writing in question than that derived in court from a comparison of the disputed writing with other documents conceded or proved to be genuine, not only may point out the characteristics and differences, but may give his opinion as to the genuineness or simulation of the handwriting from such comparison.

*Miles v. Loomis*, 75 *N. Y.*, 288; s. c., 31 *Am. Rep.*, 470, aff'g 10 *Hun (N. Y.)*, 372. This decision in effect overrules many earlier decisions of the lower New York courts.

*Sudlow v. Warshing*, 108 *N. Y.*, 520.

The restriction of this rule, as laid down in the first case cited, to comparison with documents already in evidence, has been superseded in New York and Iowa by statute; and in several other jurisdictions has not existed. See § 437.

*Contra:*

*Pennsylvania*: *McKinney v. Nolf* (*Pa.*, 1887), 9 *Cent. Rep.*, 804; s. c., 11 *Atlantic Rep.*, 111; *Travers v. Brown*, 43 *Pa. St.*, 9.

*Maryland*: *Tome v. Parkersburg etc. Ry. Co.*, 39 *Md.*, 36.

*Kentucky*: *Fee v. Taylor*, 85 *Ky.*, 252, 259 (holding it only allowable where the writing is so old that living witnesses cannot be had, but not old enough to prove itself).

*United States courts*: *Williams v. Conger*, 125 *U. S.*, 397, 413. (*Dictum*, that "it is well settled that a witness who only knows a person's handwriting from seeing it in papers produced on the trial and proved or admitted to be his, will not be allowed from such knowledge to testify to that person's handwriting, unless the witness be an expert and the writing in question is of such antiquity that witnesses acquainted with the person's handwriting cannot be had.")

In *South Carolina* the competency of opinions of experts or other sufficiently qualified witnesses to state an opinion formed by comparison in court, is held to depend on whether the direct proof is doubtful or conflicting. *Graham v. Nesmith*, 25 *S. C.*, 285; *Hall & Co. v. Flanigan*, 18 *S. C.*, 506.

§ 431. *Expert's testimony to peculiar characteristics.*—An expert may be asked to point out to the jury peculiarities and differences between different handwriting,<sup>1</sup> and give an opinion as to naturalness or simulation,<sup>2</sup> even in those jurisdictions where experts are not allowed to give an opinion as to genuineness based upon a comparison.<sup>3</sup>

<sup>1</sup> *Goodyear v. Vosburg*, 63 *Barb. (N. Y.)*, 154. (*Dictum*, in effect, that if a genuine document is properly in evidence for other purposes, an expert may point out the differences between the signature thereto and the signature in dispute, as to naturalness or simulation, color of ink, manner of formation, characteristics of letters, etc., and say, that if one is genuine he would reject the other; but holding it reversible error to allow such comparisons to be made with the signature of a document introduced for that sole purpose.) [The statute (L. 1880, ch. 36) has now superseded the holding upon the latter point.]

*United States v. Chamberlain*, 12 *Blatch. (C. C.)*, 390. (*Ruled* on trial for depositing scurrilous postal cards in the mail, that an expert might point out to the jury features of defendant's handwriting already in evidence, identical with those displayed by the cards.)

<sup>2</sup> In *Sudlow v. Warshing*, 108 *N. Y.*, 520, in an action to recover possession of land, the plaintiffs denied the genuineness of the signatures to the deed under which defendants claimed; but testified that they bore a resemblance to their signatures and to those of the other grantors; and one of them testified that what purported to be his signature to the deed was a fair imitation. An expert for defendants was allowed against objection to testify that he found no evidence in the said signatures that they were "simulated imitations instead of genuine signatures." *Held*, on error.

*People v. Hewitt*, 2 *Park. Cr. (N. Y.)*, 20. (*Held*, on trial for forgery, no error to permit experts to give their opinion that the instrument alleged to be forged, is not a simulated hand.)

*Moody v. Rowell*, 17 *Pick. (Mass.)*, 490; s. c., 28 *Am. Dec.*, 317. (*Held*, no error to permit an expert to give an opinion from a mere inspection of the disputed signature, as to "whether it is a free, natural, and genuine hand, or a stiff, artificial, and imitated one.")

See also last note (*above*).

<sup>3</sup> *Travers v. Brown*, 43 *Pa. St.*, 9. (*Dictum*, in effect, that experts may give their opinion as to whether a signature appears simulated or natural, and may point out peculiarities thereof; but holding it reversible error for them to compare it with a genuine standard, this being the sole province of the jury in that state.)

§ 432. *Expert cross-examined on differences.*—An expert testifying against the genuineness of a signature, may be required on cross-examination to point out what differences

he can discover between such signature and a genuine signature used as a standard of comparison.

In *Winne v. Tousley*, 36 *Hun* (N. Y.), 190, where a witness had given his opinion that from its general appearance and the formation of certain of its letters, the disputed signature was not genuine, *held*, reversible error to exclude upon cross-examination, a question requiring him to describe what differences he could discover between certain letters in the disputed signature and the same letters in a genuine signature in evidence as a standard of comparison; for under the statute (N. Y. L., 1880, ch. 36), both witness and the jury may make comparisons, and the opposite party has a right to thus test the witness upon cross-examination.

[It does not clearly appear from the report whether the witness was an expert or not.]

§ 433. *Cross-examination for purpose of contradiction.*—The rule that cross-examination on an irrelevant document not already received as a standard of comparison is not allowable, applies to an expert.

*Rose v. First National Bk.*, 91 *Mo.*, 399; s. c., 8 *Western Rep.*, 624, cited under § 429 (*above*).

#### IV.—STANDARDS OF COMPARISON (WITH OR WITHOUT THE AID OF EXPERTS).

§ 434. *In absence of statute, document not already in the case cannot be used for comparison.*—In the absence of statute, no document can be used as a standard of comparison, unless genuine, and already in the case for other purposes.

This is according to the weight of authority. In some jurisdictions the contrary rule prevails; see § 437 (*below*).

*Williams v. Conger*, 125 *U. S.*, 397, 413 (*dictum*).

*People v. Parker*, (*Mich.*, 1887), 11 *Western Rep.*, 182; s. c., 34 *Northwestern Rep.*, 720 (reversible error to use others).

*State v. Clinton*, 67 *Mo.*, 380 (reversible error to allow experts to give their opinion, based upon comparison with others).

*Rose v. First Nat. Bk. of Springfield*, 91 *Mo.*, 399; s. c., 8 *Western Rep.*, 624. (*Held*, reversible error to permit witness to be cross-examined as to genuineness of signatures to papers not already in evidence for other purposes; and to contradict his answers



thereto; for the rule which excludes extrinsic papers and signatures for purposes of comparison, applies also in cross-examination.)

State *v. Miller*, 47 *Wisc.*, 530; s. c., 3 *Northwestern Rep.*, 31. (*Held*, reversible error to admit a letter not already in the case; for standards of comparison must be clearly proved to be genuine, and already in the case for some other purpose. So held even where the offered letter had been written by defendant at request of the police, who dictated the exact language of an original letter in dispute and alleged to contain his threat to commit the crime of which he was charged, and where the copy so made, contained a *facsimile* of words of peculiar form, style and orthography, in the original letter.)

Compare United States *v. Chamberlain*, 12 *Blatch. (C. C.)*, 390.

United States *v. Jones*, 10 *Fed. Rep.*, 469. (*Held*, no error to refuse to permit an expert not familiar with the handwriting of the accused, to compare the disputed handwriting *with writing made in court* by the accused, and give an opinion as to genuineness of the disputed writing, as the writing made in court was not in evidence for other purposes, and under the circumstances might not be regarded as the usual handwriting of the accused.)

§ 435. *What is considered as in evidence.*—A paper which was put in evidence by the adverse party,<sup>1</sup> or, which on being offered generally against him, was received without objection on his part,<sup>2</sup> must be deemed properly in evidence for the purpose of using it as a standard of comparison, although it is irrelevant and should have been excluded if objected to.

<sup>1</sup> *Smyth v. Caswell*, 67 *Tex.*, 567; s. c., 4 *Southwest. Rep.*, 848.

<sup>2</sup> *Miles v. Loomis*, 75 *N. Y.*, 288, 292; s. c., 31 *Am. R.*, 470; aff'g 10 *Hun (N. Y.)*, 372.  
S. P., *Hanley v. Gandy*, 28 *Tex.*, 213.

§ 436. *Use of papers in the record.*—The signature of a party to an affidavit, pleading,<sup>1</sup> or other proceeding, used by him in the cause may be used as a standard of comparison against him, but is not evidence for that purpose in his favor.<sup>2</sup>

<sup>1</sup> *Medway v. United States*, 6 *Ct. of Cl.*, 421 (a strong case: *ruled*, that the court of claims, like a jury, could compare a disputed signature with the genuine

signature of the claimant to the petition in suit, where such comparison resulted adversely for the claimant.

<sup>2</sup> *Springer v. Hall*, 83 *Mo.*, 693. (*Held*, reversible error to permit an expert and the jury to compare the signature disputed by defendant with the genuine signature of the defendant to his answer at the instance of the defendant, because this would encourage the manufacture of evidence for the occasion.)

*Contra*: *Thomas v. State*, 103 *Ind.*, 419. (*Held*, no error for an expert to compare a disputed letter with a genuine affidavit of defendant made for a change of venue in the case, and to give an opinion as to the genuineness of such letter, in defendant's behalf.)

§ 437. *Use of irrelevant documents as standards.*—In some jurisdictions without statute,<sup>1</sup> and in New York<sup>2</sup> and Iowa<sup>3</sup> by recent statute, any writing proved to the satisfaction of the court,<sup>4</sup> or admitted to be genuine, may be used as a standard of comparison; the opinions of experts may be taken on the comparison; and the standards may be submitted for inspection and comparison by the jury.

<sup>1</sup> *Tyle v. Todd*, 36 *Conn.*, 218.

*Burdiet v. Hunt*, 43 *Ind.*, 380.

*Macomber v. Scott*, 10 *Kan.*, 335.

*Comm. v. Andrews*, 143 *Mass.*, 23; s. c., 3 *New Engl. Rep.*, 109; 8 *Northeast. Rep.*, 643.

*State v. Thompson*, 80 *Me.*, 194; s. c., 6 *New Engl. Rep.*, 420.

*Morrison v. Porter* 35 *Minn.*, 425; s. c., 29 *Northwestern Rep.*, 54.

*Wilson v. Beauchamp*, 50 *Miss.*, 24.

*Yeomans v. Petty*, 40 *N. J. (Eq.)*, 495.

*State v. Hastings*, 53 *N. H.*, 452, 461 (*dictum*).

*Bell v. Brewster*, 44 *Ohio St.*, 690; s. c., 10 *Northeast. Rep.* 679 (*dictum*).

*Travers v. Brown*, 43 *Pa. St.*, 9 (*dictum*).

[But in Pennsylvania the opinions of experts are not received, see § 430.]

*Smyth v. Caswell*, 67 *Tex.*, 567; s. c., 4 *Southwest. Rep.*, 848.

*Kennedy v. Upshaw*, 64 *Tex.*, 411.

*Durnell v. Sowden* (*Utah*, 1887), 14 *Pacific Rep.*, 334.

*Adams v. Field*, ex'r, 21 *Vt.*, 256.

*Roswell v. Fuller's Estate*, 59 *Vt.*, 688; s. c., 10 *Atlantic Rep.*, 853.

<sup>2</sup> *N. Y. L.* 1880, ch. 36.

<sup>3</sup> *Iowa Code* § 3655.

*State v. Calkins*, 73 *Iowa*, 138; s. c., 34 *Northwest. Rep.*, 777.

<sup>4</sup>In New Hampshire, however, the jury are to pass upon the standard of comparison.

*State v. Hastings*, 53 *N. H.*, 452, 461. (*Dictum*, that papers for mere purpose of comparison with a disputed handwriting, may be put in evidence; and it is for the jury first to determine the genuineness of such papers from the evidence, whether on admission of genuineness, or opinion of one acquainted with the handwriting; and then are to determine whether the disputed writing is genuine from all the evidence, including that of experts making comparisons in court, and also from a comparison made by the jury themselves. Judgment reversed because incompetent evidence had been admitted to prove genuineness of the standard.)

§ 438. — *writing of third person*.—This rule is not extended by implication to the writings of a third person to whom the party contesting the genuineness of the writing in question imputes it.<sup>1</sup> But in New York a recent statute extends the rule to such cases.<sup>2</sup>

<sup>1</sup> *Peck v. Callaghan*, 95 *N. Y.*, 73. (*Held*, no error to exclude specimens of handwriting of the person alleged to have forged the signature of a contested will, because no documents other than those in the handwriting of the person whose signature the one in question purports to be, could then be put in evidence under *N. Y. L.* 1880, ch. 36, authorizing a comparison by witnesses “of a disputed writing with any writing proved to the satisfaction of the court to be genuine.”)

*Contra*: *Koons v. State*, 36 *Ohio St.*, 195. (Here an expert was permitted to give an opinion in behalf of the prosecution as to whether the alleged forged check and the confessedly genuine signature of the *accused* on trial for the forgery, were in the same handwriting.)

That such comparison is proper seems to have been assumed without discussing the point; but the judgment was reversed on other grounds.

<sup>2</sup> *N. Y. L.* 1888, p. 912, c. 555.

§ 439. *What law controls*.—The state statute is not binding on the Federal courts.

*United States v. Jones*, 10 *Fed. Rep.*, 469. (*Held*, that “the statute of the State of New York permitting a comparison of writings for the purpose of determining handwriting, has no effect upon criminal proceedings in the courts of the United States.” So held no error to exclude writing made in court for purpose of comparison with disputed writing.)

In *Whitford v. Clark Co. Bank*, 119 *U. S.*, 522, 525; *s. c.*, 30 *Law. ed.*, 500, the court say: "When the statutes of the United States make special provisions as to the competency or admissibility of testimony, they must be followed in the courts of the United States, and not the laws or practice of the state in which the court is held when they are different,"—citing cases.

§ 440. *Disputed writing and standard to be produced before comparison.*—The production of the original writing which is disputed is essential before the opinions of experts can be received.<sup>1</sup> The production of the standard is equally essential.<sup>2</sup> Neither a letter-press copy,<sup>3</sup> nor a photograph<sup>4</sup> is available as a substitute for comparison.

[I state the rule as above in deference to the authorities below stated, but I think it needs qualification.

There is an important difference of principle not noticed in the authorities, between allowing counsel to use for comparison a substitute for the disputed writing, such as a photograph or letter-press copy, and allowing him to use a similar substitute for an irrelevant standard.

The admission of secondary evidence of the disputed writing rests upon a good excuse for not producing the original. There can hardly be a good excuse for producing imitated instead of original standards, especially as relevancy is not required. And a party who is obliged to submit to having the disputed writing proved by an imitation without producing the original, ought not thereby to be further deprived of the right to give genuine and original standards of comparison in evidence. In my opinion the true general rule is that he who relies on a facsimile of the original cannot object to comparison with genuine standards. But that he who wishes to disprove an alleged original cannot do so with facsimile standards.

The authorities are below.]

<sup>1</sup>*Spottiswood v. Weir*, 66 *Cal.*, 525. (*Held*, reversible error to allow an expert to give an opinion upon the genuineness of a disputed writing by comparing a letter-press copy thereof with specimens admitted to be genuine. The court said: "This is not permissible under any rule with which we are acquainted. It is essential that the document whose genuineness is sought to be proved, should itself be produced. When the disputed writing is produced, evidence resulting from a comparison of it with other proved or admitted writings, is not regarded as evidence of the most satisfactory character, and by some courts is entirely excluded.")

Whether an accurate photograph proved to be accurate can be received is perhaps another question.

In *Tone v. Parkersburg etc. Ry. Co.*, 39 *Md.*, 36, it was held reversible error to allow an expert in handwriting (and photographer by profession) to produce in evidence photographic copies (both exact in size and also magnified) of the disputed signature, and also of confessedly genuine signatures already in evidence for other purposes, and to give an opinion as to genuineness from comparison of such photographic copies; for under the rule for proving handwriting in Maryland there can be no comparison of originals, much less of photographic copies.

*Contra*: *Koons v. State*, 36 *Ohio St.*, 195. (Here an expert had seen the alleged forged check several months before the trial of defendant for the forgery; but the prosecution, after efforts to do so, were unable to produce the check at the trial:—*held*, that its presence was not indispensable to the competency of the expert in behalf of the prosecution, to state whether the check in his opinion was in the same handwriting with a genuine signature of the accused shown to the expert at the trial. But judgment was reversed on other ground.)

<sup>2</sup> *Hynes v. McDermott*, 82 *N. Y.*, 41, 49. (*Held*, no error to refuse to allow an expert to give an opinion of the genuineness of a disputed writing by comparison merely with a photographic copy of an admittedly genuine writing, where the original standard was not produced. The court said: "An expert in handwriting when speaking as a witness only from a comparison of handwriting, that is, with two pieces of it in juxtaposition under his eye, should have before him in court the writing to which he testifies; else there can be no intelligent examination of him either in chief or cross; nor can there be fair means of meeting his testimony by that of other witnesses;" and as the correctness of the photograph was not testified to, the court held it was proper to exclude such comparison.

*Tyler v. Todd*, 36 *Conn.*, 218. (*Dictum*, that it is error to allow an expert to give an opinion as to genuineness of handwriting based upon a comparison out of court, of signatures not before the court.)

<sup>3</sup> *Comm. v. Eastman*, 1 *Cush. (Mass.)*, 189, 217. (*Held*, reversible error to permit an expert to give an opinion as to genuineness of a disputed writing based upon a comparison with letter-press copies of original letters as a standard of comparison. The court said: "Nothing but original signatures can be used as standards of comparison, by which to prove other signatures to be genuine.")

<sup>4</sup> *Hynes v. McDermott* (*above cited*; where, however, stress was laid on the fact that there was no proof of the accuracy of the photographs).

[For the rule that refusal to produce the original raises a presumption against the paper, see *Sharon v. Hill*, 26 *Fed. Rep.*, 337. Mr. Stewart's argument in this case with facsimile and magnified reproductions has been printed. *San Fran.*, 106 pp.]

§ 441. *Genuineness of standards, a question for the court.*

—The genuineness of standards of comparison, is a preliminary question for the court to determine.

*Hall v. Van Vranken*, 28 *Hun* (N. Y.), 403, where the court said: "The sufficiency of the proof which shall show that a paper is genuine so that it may be used for comparison, must be left to the trial judge," but "possibly to admit a paper without any evidence of its genuineness might be error."

*State v. Thompson*, 80 *Me.*, 194; s. c., 6 *New Engl. Rep.*, 420. (*Held*, that his decision is final and conclusive, if there is any proper evidence to support it, unless clearly based on erroneous views of legal principles. Hence, held no error to admit an irrelevant standard for sole purpose of comparison by experts, where two witnesses claiming to have seen the person write, and to be acquainted with his writing, testified that the standard offered was in his handwriting.)

*Comm. v. Coe*, 115 *Mass.*, 504.

In *Costello v. Crowell*, 139 *Mass.*, 590, the court said it was for the judge to determine "whether it is shown by clear testimony that it [standard] is the genuine handwriting of the party sought to be charged. Unless his finding is founded upon error of law, or upon evidence which is as a matter of law insufficient to justify the finding, this court will not revise it."

*Rowell v. Fuller's Estate*, 59 *Vt.*, 688; s. c., 10 *Atlantic Rep.*, 853. (*Held*, reversible error for the judge to leave the question of genuineness of standards to the jury, as this is a preliminary question for the court upon the same rules of evidence as to any issue in the case—citing and disapproving the doctrine laid down in *State v. Ward*, 39 *Vt.*, 225, as a *dictum* not essential to the decision. The court in that case said, the question of genuineness of standards is a preliminary one for the court, but in criminal cases the jury must also determine whether the standards of comparison are proved to be genuine beyond a reasonable doubt before making comparisons with the disputed writings themselves; but held that it was no error for experts to make the comparison before the papers were given to the jury to compare.)

*Contra*: State v. Hastings, 53 N. H., 452. (*Dictum*, that the jury are first to determine from the evidence whether such specimens are genuine.)

§ 442. *Requisite authentication of standards of comparison*.—Although under the statute, the judge may, on the question of the genuineness of a proposed standard of comparison, hear evidence of any kind that might be received as to a writing actually in issue, and the decision is in his discretion; yet, in general, sound discretion will not admit a standard unless there is direct evidence in its favor (such as evidence of acknowledgment, or admission or knowledge of handwriting, as distinguished from comparison, and from opinions of experts founded on comparison), or unless the indirect evidence relied on is so clear that were it a question for the jury he could properly direct their finding on it.

This I understand to be the result of the authorities and the statute. Independent of the statute, the better opinion is that the discretion of the court should be exercised to require clear proof, and to refuse to try the collateral question on indirect or conjectural evidence. Under the statute such evidence is doubtless competent; but should rarely be alone satisfactory. The statute was intended to adopt the judicial rule in force in other jurisdictions allowing use of standards; but what ought to satisfy the judge under the statute is dependent on the same considerations as at common law.

The following cases illustrate the principle laid down in the text:

In *McKay v. Lasher*, 50 *Hun* (N. Y.), 383, it was held no error to prove standards by persons familiar with the handwriting; and that proof of their genuineness need not be by admission, nor by the direct evidence of one who saw the offered standards written; for, as there is nothing in the New York statute (L. 1880, ch. 36) specifying the mode of proving them, they may be proved in the same manner as before the statute; and as the statute only requires them to be proved "to the satisfaction of the court," this "seems to put the matter exclusively in the judgment of the trial court, unless possibly in a case where there was an entire absence of evidence."

*Hall v. Van Vranken*, 28 *Hun*. (N. Y.), 403. *Held*, no error to admit a deed, duly acknowledged, as a standard, without further proof of genuineness of the signature; for such acknowledgment was *prima facie* evi-

dence of such genuineness, and sufficient, especially so, here in absence of the defendant's denial whose deed it purported to be, and who was present at the trial of this action upon a promissory note, the signature of which he disputed. The court said the judge is to pass upon the sufficiency of the evidence, but that, "possibly, to admit a paper without any evidence of its genuineness might be error." [Of course it would.] *Winch v. Norman*, 65 *Iowa*, 186. *Held*, reversible error to allow a document to go to the jury as a standard where the only proof of its genuineness consists in comparison by experts with some other writing admitted to be genuine. The court say: "It appears to us that the genuineness of the writing made the basis of comparison, called sometimes the standard writing, should be proved by direct or positive evidence," and approve of the statement in an early *Iowa* case, that such proof should be by the testimony of a witness who saw it written, or by the person's admission when not offered by himself, or by some other positive proof.

*Moody v. Rowell*, 17 *Pick. (Mass.)*, 490; s. c., 28 *Am. Dec.*, 317. *Dictum*, that proof of genuineness of a standard "must be direct to the fact of its having been actually written by the party, by one who saw him write it."

*Comm. v. Eastman*, 1 *Cush. (Mass.)*, 189, 217. *Dictum*, that a paper proposed as a standard cannot be "proved to be an original and a genuine signature merely by the opinion of a witness that it is so; such opinion being derived solely from his general knowledge of the handwriting of the person whose signature it purported to be." \* \* \* "The handwriting used as a standard must first be established by clear and undoubted proof, that is, either by direct evidence of the signature or by some equivalent evidence"—citing *Moody v. Rowell (above)*, *Bacon v. Williams*, 13 *Gray (Mass.)*, 525, 527.

*Martin v. Maguire*, 7 *Gray (Mass.)*, 177. *Held*, no error to exclude a mortgage as a standard where the only proof offered of the genuineness of the grantor's signature was proof of the handwriting of an absconding subscribing witness; for a standard "must be unquestionably a genuine paper, and that must be shown beyond a doubt."

But the two following cases relax somewhat the rule of the earlier Massachusetts cases (*above*).

*Costelo v. Crowell*, 139 *Mass.*, 590. *Held*, no error to admit certain deeds and a discharge of a mortgage as standards, where an attesting witness testified that the body of the documents was in his handwriting as attorney for the signer, and that although he did not



remember seeing the documents signed, yet he knew he either saw them signed, or that the signer acknowledged the signature to be his, before the witness attested them. The court was of the opinion that under the Massachusetts rule the evidence "was sufficient to prove the genuineness of the signatures of the defendant which were offered as standards."

*Comm. v. Coe*, 115 *Mass.*, 504. *Held*, no error to admit the body of a promissory note as a standard where the signature was admitted to be genuine, and a witness for the prosecution testified (and it was admitted) that the note was delivered by the defendant to the witness, but there was nothing directly to show that the body of the note was genuine except the inference of fact drawn by the judge from the failure of the defense to offer any evidence in denial that the entire note was in the defendant's handwriting when within the knowledge and power of the defendant to thus deny, if the body of the note was not genuine.

*Brant v. Dennison* (*Pa.*, 1885), 5 *Atlantic Rep.*, 869. *Held*, no error to exclude receipts as a standard, where the only proof of genuineness of signature thereto was the testimony of a witness without personal knowledge of the person's handwriting, that he sent the receipts (by mail) in blank to such person to be signed, and that they were returned by another person by mail.

*Long v. State*, 10 *Tex. App.*, 186. A witness adopted as a standard, a letter found addressed to himself purporting to come from a penitentiary convict, the authorship of which was subsequently acknowledged by such convict:—*held*, error to admit it as a standard; for in Texas a felon is incompetent as a witness, and therefore no admission or fact stated by such felon could be detailed or used as evidence against a third person for any purpose. Judgment reversed on this and other grounds.

*United States v. McMillan*, 29 *Fed. Rep.*, 247. *Ruled* that an expert could not compare disputed signature with letters not belonging to the witness, nor in his custody, nor parts of the record, nor admitted to be genuine, and as to which the witness only swore to his belief of genuineness.

*State v. Thompson*, 80 *Me.*, 194; s. c., 6 *New Engl. Rep.*, 420, quotes with apparent approval the language of the court in *State v. Hastings*, 53 *N. H.*, 461, and *Rowell v. Fuller*, 59 *Vt.*, 688, to the effect that although great care should be taken that the standard should be genuine, yet any competent evidence tending to prove that the paper is genuine, is to be received, whether the evidence be in the nature of an admission, or the opinion of a witness who knows his handwriting or

of any other kind whatever. Hence, held sufficient proof, of a standard, where two witnesses claiming to have seen the person write and to be acquainted with his handwriting, testified that the offered standard was in his handwriting.

*Bell v. Brewster*, 44 *Ohio St.*, 690; s. c., 10 *Northeast. Rep.*, 679. *Held*, no error to admit as a genuine standard a document purporting or proved to be thirty years old, because when such a document is "produced from its proper custody, it is presumed that the signature and every other part of such document which purports to be in the handwriting of any particular person, is in that person's handwriting" without other proof of their authenticity; and that the proper repository or custody of such papers is the place where papers of its kind are usually deposited. In Indiana it seemed that the standard must be admitted to be genuine:

*Chance v. Indianapolis etc. Gravel Road Co.*, 32 *Ind.*, 472, 474. *Dictum* that "comparison by experts must be confined to other writings admitted to be genuine. No collateral issue will be permitted. If there is any dispute as to their authenticity, the comparison will not be permitted." *Burdiet v. Hunt*, 43 *Ind.*, 380.

§ 443. *Comparison by jury or referee*.—Standards of comparison, properly received either under the judicial or the statutory rule, may be compared by the jury,<sup>1</sup> or referee,<sup>2</sup> with the handwriting in question, whether witnesses have made comparison or not.<sup>3</sup>

<sup>1</sup> *Van Wyck v. McIntosh*, 14 *N. Y.*, 439.

Approved and followed in *Williams v. Conger*, 125 *U. S.*, 414, and in *Pontius v. People*, 82 *N. Y.*, 339; aff'g 21 *Hun (N. Y.)*, 328.

*United States v. Chamberlain*, 12 *Blatch. (C. C.)*, 390.

*Rowell v. Fuller's Estate*, 59 *Vt.*, 688; s. c., 10 *Atlantic Rep.*, 853.

*State v. Clinton*, 67 *Mo.*, 380 (*dictum*).

*Rose v. First Nat. Bk. of Springfield*, 91 *Mo.*, 399; s. c., 8 *Western Rep.*, 624 (*dictum* to same effect).

<sup>2</sup> *Hunt v. Lawless*, 7 *Abb. N. C.*, 113; aff'd without opinion, in 47 *N. Y. Super. Ct. (J. & S.)*, 540.

<sup>3</sup> *Medway v. United States*, 6 *Ct. of Cl.*, 421.

*Moore v. United States*, 91 *U. S.*, 270.

*Comm. v. Andrews*, 143 *Mass.*, 23; s. c., 3 *New Engl. Rep.*, 109; 8 *Northeast. Rep.*, 643.

*Travers v. Brown*, 43 *Pa. St.*, 9 (*dictum*).

§ 444. *Taking to the jury room*.—Standards of comparison, properly received under either rule, are documents in evi-

dence within the rule allowing the court to permit such documents to be taken out by the jury.

*Hardy v. Norton*, 66 *Barb. (N. Y.)*, 527. (*Held*, discretionary with the court and not error to allow the jury upon retiring to consider their verdict to take the writing in dispute and other genuine writings already in evidence for other purposes, to the jury room for the purpose of comparison of handwriting.) [*N. Y. L.*, 1880, c. 36, now allows irrelevant standards of comparison.]

*Comm. v. Andrews*, 143 *Mass.*, 23; s. c., 3 *New Engl. Rep.*, 109; 8 *Northeastern Rep'r*, 643.

*State v. Scott*, 45 *Mo.*, 302.

In *Means v. Means*, 7 *Rich. L. (S. C.)*, 533, it is held to be a matter in the discretion of the court.

*Contra*: *Matter of Foster*, 34 *Mich.*, 21; *Chance v. Indianapolis Ry. Co.*, 32 *Ind.*, 472.

In *Howell v. Hartford Fire Ins. Co.*, 6 *Biss. (C. C.)*, 163, reasons are given why it is thought the comparison should be made only in open court; and it was held no ground for a new trial to refuse to permit the jury to take out papers for that purpose.

In *Cox v. Straisser*, 62 *Ill.*, 383, a document used for comparison, by consent, was held not a paper "*read in evidence*" within the meaning of a statute of Illinois allowing such papers to go to the jury room.

As to when documents may be taken out, see *Trial Brief for Civil Issues*, p. 165; *Criminal Trial Brief*, §§ 806-812.

## V.—PHOTOGRAPHS, MAGNIFYING-GLASS, AND SUPER-POSITION.

§ 445. *Photographic copies*.—Photographic copies and photographic magnified copies of the disputed writing, and of such genuine writings as are available by way of comparison may be used as aids to assist the jury in their conclusions.<sup>1</sup>

But an expert should not be permitted to testify from such copies alone, without the presence of the originals, at least in the absence of evidence of the exactness of the photographing.<sup>2</sup>

<sup>1</sup> *Frank v. Chemical Nat. Bk.*, 37 *N. Y. Super. Ct. (J. & S.)*, 26, 34. (*Dictum*.)

*Rowell v. Fuller's Estate*, 59 *Vt.*, 688; s. c., 10 *Atlantic Rep.*, 853. (*Dictum*, that it is proper to use photographs of the different signatures; for "enlarged copies of a disputed signature or writing and of those used as comparison may be of great aid to a jury in comparing

and examining different specimens of one's handwriting. Characteristics of it may be brought out and made clear by the aid of a photograph or magnifying glass which would not be discernible by the naked eye. As well object to the use of an eye glass by one whose vision is defective.")

*Marcy v. Barnes*, 16 *Gray (Mass.)*, 161. (Action upon promissory notes: The genuineness of the maker's signature, being in issue, magnified photographic copies of genuine signatures of defendant, and of the disputed signature, having first been proved to be accurate, were admitted. *Held*, proper. It was similar to an examination with a magnifying glass. *MERRICK, J.*, said: "Under proper precaution in relation to the preliminary proof as to the exactness and accuracy of the copies produced by the art of the photographer, we are unable to perceive any valid objection to the use of such prepared representations of original and genuine signatures as evidence competent to be considered and weighed by the jury.")

*Duffin v. People*, 107 *Ill.*, 113; s. c., 47 *Am. Rep.*, 430. (*Dictum*, that the testimony of an artist or expert may be required to prove the process of taking a photograph of a document where it is material to show that the photographic copy is an exact copy of the original in respect to form, shading and coloring; but holding it no error to admit a photographic copy of a promissory note without proof of the process of taking, where the object was not to prove handwriting but merely to prove the *words* of the original, written in rapidly fading ink.)

*In Leathers v. Salvor Wrecking Co.*, 2 *Woods (C. C.)*, 680, it was ruled that where, as here, the original documents necessary for the decision of the case were on file in the U. S. war department, and could not well be removed from the files without public detriment, it was proper to introduce photographic copies as the best secondary evidence thereof on "an authentication of their genuineness in the usual way by proof of handwriting."

*S. P.*, *Luco v. United States*, 23 *How. (U. S.)*, 515.

*Contra*: In the *Taylor Will Case*, 10 *Abb. Pr., N. S. (N. Y.)*, 300, Surrogate Hutchings reviewed at length the defects of photographic copies and held that photographic copies of the disputed and of genuine signatures are inadmissible to aid an expert in giving his opinion based on comparison as to the genuineness of the disputed signature where all the originals are present in court, because too many collateral issues, as to the accuracy of the photographs, etc., would be involved.

*Eborn v. Zimpelman*, 47 *Tex.*, 503; s. c., 26 *Am. Rep.*,

315. (In an action on promissory notes, against the personal representatives of the deceased maker, the genuineness of handwriting being the issue, photographic copies of the instruments sued on were introduced in evidence. The artist taking them testified to their accuracy. *Held*, reversible error to admit them for the reason that photographic copies of instruments sued on can only be used as secondary evidence, and it did not appear that the originals might not have been produced.)

In *United States v. Messman*, 1 *Central L. J.*, 121, it was ruled by BLATCHFORD, J., that upon a defense of forgery, photographic copies of the originals alleged to be forged cannot be introduced in evidence where the originals can be produced; and the trial was postponed in order that the originals might be procured. *Tome v. Parkersburg Branch R. R. Co.* 39 *Md.*, 36; s. c., 17 *Am. Rep.*, 540. (Photographs excluded on the ground that such evidence is only secondary, and also on the ground that there can be no comparison of originals by experts in Maryland,—much less of photographic copies.)

In *Foster's will*, 34 *Mich.*, 21, it was held no error to refuse to permit the contestants to furnish the jury with photographic copies of the contested will, where the original was in court, although the court said that if the photographs had been given with such precautions as to secure their identity, and correctness, it might not have been error.

<sup>2</sup>*Hynes v. McDermott*, 82 *N. Y.*, 41, 50; s. c., 37 *Am. Rep.*, 538, aff'g 7 *Abb. N. C.*, 98. (*Held*, no error to refuse to permit an expert to testify as to genuineness of a signature by comparison in court with only photographic copies of absent genuine documents, where there is no evidence as to the manner of taking or accuracy of such copies.)

§ 446. *Use of magnifying-glass.*—A magnifying-glass, proved correct by an expert, may be used by a referee to determine whether checks are forged, the referee occupying the place of a jury.<sup>1</sup>

<sup>1</sup>*Frank v. Chemical National Bank of N. Y.*, 45 *N. Y. Super. Ct. (J. & S.)*, 452, aff'd. without passing upon this point, in 84 *N. Y.*, 209. (*Held*, no error for the referee to admit such glass in evidence, and to thus use the same after an oculist had testified that the glass was correct and magnified four times.)

In *Baker v. Stucke*, 18 *Chic. L. News*, 306, it was held in effect that where it is alleged that erasures have been made, any man with ordinary information and accustomed to examine things through a microscope

is competent to testify as to his opinion thereon from such an examination. The subject of "Microscopic Experts in Writing" is discussed in the *New Jersey Law Journal* for July, 1880.

§ 437. *Tracing and super-position.*—The perfect correspondence of the disputed signature with a genuine one when super-imposed against the light, is proof of simulation.

Hunt v. Lawless, 7 *Abb. N. C.*, 113, ex-Judge Fancher as Referee: (aff'd on his opinion in 47 *N. Y. Super. Ct. (J. & S.)*, 540).

It seems that such proof is conclusive; and would require an instruction to the jury to that effect.

#### VI.—CIRCUMSTANTIAL EVIDENCE AND ADMISSIONS.

§ 448. *Peculiar usages of language.*—Writings not relevant to the cause, may be received irrespective of the rule as to standards of comparison, when offered not for the purpose of comparing handwriting as such, but for the purpose of showing identical or dissimilar usages of language, such as characteristic mistakes in spelling.

United States v. Chamberlain, 12 *Blatch. (C. C.)*, 390. (*Ruled*, upon trial for depositing scurrilous postal cards in the mail, that it was competent to prove other writings of the defendant containing characteristic instances of misspelling identical with such errors in the said cards to connect the defendant with them.)

Sprouse v. Commonwealth, 10 *Va. L. J.*, 181. (*Held*, no error to admit evidence that defendant, charged with forgery, was asked by the magistrate before whom he was first brought, to write a certain word occurring in the forged document, and that, without threat or promise, he wrote and misspelled the word precisely as it was misspelled in the document.)

Compare: State v. Miller, 47 *Wisc.*, 530; s. c., 3 *North-west. Rep.*, 31, to the contrary, but the court only considered the question with reference to comparison of handwriting, and the doctrine of the above case in Blatchford's reports does not seem to have been called to their attention.

§ 449. *Aptitude to imitate.*—In a conflict of testimony as to whether one person had forged or imitated the writing of another, it is competent to show that the former had scrutinized and commented on peculiarities in the manner of the latter's writing.

*Pontius v. People*, 82 *N. Y.*, 339; aff'g 21 *Hun (N. Y.)*, 328 (so held in a criminal case, where forgery was relied on, as tending to show motive).

Compare: *Costelo v. Crowell*, 136 *Mass.*, 588 (where it was held no error upon an issue of forgery, to reject evidence that the plaintiff had committed similar forgeries, or that he had the skill, etc., to enable him to forge the note in suit).

§ 450. *Opportunity*.—Evidence of opportunity tending to show how an hypothesis of fabrication suggested by the evidence may have been the fact, is competent.

*Brant v. Dennison (Penn., 1885)*, 3 *Eastern Rep.*, 9, 11; s. c., 5 *Atlantic Rep.*, 869; 1 *Central Rep.*, 400 (assignment bearing indications that it was over written above a pre-existing signature. *Held*, competent to show that he whose name was affixed was in the habit of writing his name on pieces of paper and leaving them about).

*State v. Hastings*, 86 *N. C.*, 596 (not error to receive, as pointing to one accused of a forgery, evidence that he had a genuine instrument, of which the false one was a reproduction,—even though of itself insufficient to sustain conviction).

§ 451. *Condition of writer*.—The condition of the alleged writer at the time of the alleged writing, may be shown by either side, on the question whether the writing is genuine or not.

*People v. Parker (Mich., 1887)*, 11 *Western Rep.*, 182 (*dictum* as to intoxication).

See also *Taylor Will Case*, 10 *Abb. Pr., N. S. (N. Y.)*, 300, 312, 313, where the various circumstances and conditions affecting handwriting are discussed, such as the state of the bodily health, the natural, or rheumatic, or neuralgic, or gouty, or other abnormal condition of the parts of the body used in writing. the mental condition of the writer, as affected in various ways, whether by grief, anger, momentary vexations of life, pressure of business, haste or deliberation induced by the solemnity of the occasion (as the act of signing a will), or the physical circumstances surrounding the writer, such as the difference between sitting and standing in writing, the height of the table, the flexibility and peculiar character of the pen or quill, the kind of ink, the quality of paper, ruled or unruled, sized or unsized, the substance supporting the paper, whether paper, wood, cloth, or marble, etc.

§ 452. *Admission of such an instrument*.—In a conflict

of testimony as to whether a signature was genuine, it is competent to prove that the alleged signer had admitted in conversation having made a note of a specified description, which corresponds to the instrument in question.

*Bardin v. Stevenson*, 75 N. Y., 164, 167.

HEALTH AND DISEASE.—[For cognate topics see ABILITY, AUTOPSY, CONDITION, CAUSE, FEELINGS, and INTOXICATION; and, as to *Inspection* of person, *Civil Jury Brief*, p. 71; *Criminal Trial Brief*, 341, etc., 591, etc.; and, as to *Medical books*, *Civil Jury Brief*, p. 82.

§ 453. Direct testimony.

§ 454. Disease of animals.

§ 453. *Direct testimony*. — A witness having had adequate opportunities of observation may testify whether a person was sick or well,<sup>1</sup> and describe his general physical condition in respect of health,<sup>2</sup> and state symptoms discernible by a non-expert;<sup>3</sup> but cannot, unless an expert, testify to the nature or character of a disease.<sup>4</sup>

<sup>1</sup> *Higbie v. Guardian Mut. Life Ins. Co.*, 53 N. Y., 603; aff'g 66 Barb. (N. Y.), 462.

*Rawls v. Am. Mut. Life Ins. Co.*, 27 N. Y., 282; aff'g 36 Barb. (N. Y.), 357 (allowing testimony to good health and sound constitution).

*S. P., Smalley v. Appleton*, 70 Wisc., 340; s. c., 25 Northwestern Rep., 729.

*Comm. v. Sturtivant*, 117 Mass., 122, 134; citing *Willis v. Quimby*, 31 N. H., 485.

*Balt. & L. Turnpike Co. v. Cassell*, 66 Md., 419; s. c., 6 Central Rep., 462.

<sup>2</sup> In *Carthage Turnpike Co. v. Andrews*, 102 Ind., 138; s. c., 1 Northeast. Rep., 364. such testimony was held competent, provided the witness stated the facts observed, before stating his opinion; but the omission to do so was held unavailing for want of objection below. [The more prevalent view is that such testimony from a non-expert is received, not as matter of opinion based on facts to be stated, but as stating a collective fact depending on the observation of minutiae not capable of being set before the jury with the same effect that they properly produce on an observer.]

<sup>3</sup> *United Brethren Mut. Aid Ins. Co. v. O'Hara*, 120 Pa., 256; s. c., 17 Ins. L. J., 856; 12 Central Rep., 682; 13 Atlantic Rep., 932. (Error to exclude question whether witness had observed the person's shortness of breath; but not error to exclude testimony that such person had asthma.)



<sup>4</sup>Grattan v. Metropolitan Life Ins. Co., 80 N. Y., 281 ; s. c., 36 *Am. Rep.*, 617, with note.

United Brethren Mut. Aid Ins. Co. v. O'Hara (*above cited*).

*Compare* : Duntzy v. Van Buren, 5 *Hun* (N. Y.), 648 (holding that wife may be asked whether her husband had a rupture, the fact not resting in opinion nor involving skill or science); and Owens v. Kansas City, St. J. & C. B. R. Co., 95 *Mo.*, 169 ; s. c., 15 *Western Rep.*, 88 ; 8 *Southwest. Rep.*, 350 (party may testify to own nerves being paralyzed).

§ 454. *Disease of animal.*—An ordinary witness cannot testify as to the cause of a disease in a horse ;<sup>1</sup> but may testify to facts observed by him.<sup>2</sup>

Long experience in the care of horses is, however, sufficient to qualify a witness as to such diseases, without having made a business of treating them.<sup>3</sup>

<sup>1</sup>Russell v. Cruttenden (*Conn.*, 1886), 2 *New Engl. Rep.*, 126.

<sup>2</sup>Harris v. Panama R. R. Co., 36 *N. Y. Super. Ct. (J. & S.)*, 373, 378 ; aff'd, without discussing this point, in 58 *N. Y.*, 660 (holding that the mate of a vessel on which a horse was carried, having testified that the horse was sick, might be asked if he observed any alteration afterward).

<sup>3</sup>Johnson v. Moffett, 19 *Mo. App.*, 159 ; s. c., 1 *Western Rep.*, 328.

Slater v. Wilcox, 57 *Barb. (N. Y.)*, 604.

Burden v. Pratt, 1 *N. Y. Supm. Ct. (T. & C.)*, 554.

Pierson v. Hoag, 47 *Barb. (N. Y.)*, 243. (An expert may be asked "What is the best opinion by the best medical authority?")

HEARING.—[Compare ABILITY, POSSIBILITY, and NEGATIVE.]

§ 455. *Direct testimony.*—A witness may testify that a conversation occurred within the hearing of another person ;<sup>1</sup> but cannot give an opinion that such other person must have heard it.<sup>2</sup>

<sup>1</sup>*Criminal Brief*, 393, § 849.

<sup>2</sup>People v. Holfelder, 5 *N. Y. Crim. R.*, 179 (reversing judgment because an officer testifying to the silence of the accused when an incriminating statement was made in his presence, was allowed to testify that the accused must have heard it).

HORSE-POWER.—[For cognate topics see CAPACITY, CONDITION, and CONSTRUCTION.]

§ 456. *Tables*.—The number of horse power obtained from a given quantity of water may be shown by an expert whose information comes from Leffel's Tables, those tables being testified to be ordinarily used by millwrights, and by all of them considered as accurate.

Garwood v. N. Y. Central etc. R. R. Co., 45 Hun (N. Y.), 128.

Expert testimony as to which rating is meant in an advertisement, not competent. Harrington v. Smith, 138 Mass., 92.

IDENTITY.—[For cognate topics see CAUSE, CONDITION, CORROBORATION, OPINION, NAME, and MISNOMER.]

§ 457. Inspection in court; name.

458. Direct testimony.

459. — uncertainty.

460. Photographs.

461. Answering to name.

462. Slight evidence.

463. Name as evidence of identity.

§ 464. Oral evidence.

465. Commingled assets.

466. Rebuttal; testing witness.

467. — inspection and experiment,

468. — existence of a "double."

469. — name.

§ 457. *Inspection in court*,<sup>1</sup>—*name*.—The act of a witness in pointing out to the jury the person to whom his testimony refers, though without naming him, is competent evidence of his identity.<sup>2</sup> Mistake in attempting such identification may be corrected and explained by the witness.<sup>3</sup>

If a party refuses to stand up in court to be identified, the failure of the witness to identify him does not entitle him to have the testimony of the witness against him struck out.<sup>4</sup>

<sup>1</sup> Bringing a person from jail in order to be identified; *Criminal Brief*, 338, § 587.

Privilege against criminating one's self; *Id.*, 341, etc., § 591, etc.

<sup>2</sup> *Comm. v. Whitman*, 121 Mass., 361.

*S. P.*, *Sylvester v. State*, 71 Ala., 17; *s. c.*, 1 Ala. L. J., 134 (dying declarations; identifying by pointing out without naming. competent).

<sup>3</sup> *People v. Foley*, 27 N. Y. Weekly Dig., 217.

<sup>4</sup> *Walsh v. People*, 13 N. Y. Weekly Dig., 570; *aff'd* in 88 N. Y., 458, without discussing this point.

§ 458. *Direct testimony*.—A witness may testify directly to the identity of a person or thing seen by him at different times ;<sup>1</sup> but not to the fact of the identity of a person or thing with the one intended by a description given out of court by another person,<sup>2</sup> (except in the case of lands),<sup>3</sup> for this would be matter of opinion.

Nor is testimony that a third person identified the subject, competent, except where it is made so by being part of the *res gestæ*.<sup>4</sup>

<sup>1</sup> *Wharton Crim. Ev.*, 9 ed., § 459. (Opinion or belief always competent on a question of identity.)

*Abb. Tr. Ev.*, 102, 623.

*Comm. v. Sturtivant*, 117 *Mass.*, 122.

*State v. Dickson*, 78 *Mo.*, 438.

*Brotherton v. People*, 75 *N. Y.*, 159 ; aff'g 14 *Hun (N. Y.)*, 486 (identity of a person disguised).

<sup>2</sup> *Henze v. People*, 82 *N. Y.*, 611 (question whether cloth found with the prisoner was that described in the indictment, not competent).

*Whizenant v. State*, 71 *Ala.*, 383 (reversible error to receive testimony that the oxen witness had seen, corresponded with unsworn description given him of stolen oxen).

<sup>3</sup> *Whyland v. Weaver*, 67 *Barb.*, 116. (Any witness, acquainted with lands and the adjoining premises, may testify whether the premises described in one instrument are part of those described in another.)

<sup>4</sup> *Hopt v. Utah*, 110 *U. S.*, 574 ; s. c., 28 *Law. ed.*, 262. (Testimony of surgeon who made a post mortem that the body was identified by a third person.)

*Felder v. State*, 23 *Tex. App.*, 477 ; 5 *Southwest. Rep.*, 145. (Testimony that some one in the crowd pointed out a person whom witness had just met about two doors from the place of the shooting, as the one who had done the shooting.)

*Compare Jordan v. Comm.*, 25 *Gratt. (Va.)*, 943. (Here evidence was received that the victim of the robbery, immediately, as part of the *res gestæ*, described the robber to the witness, who whereupon pursued and caught the accused, who corresponded to the description.)

Approved in *Merkle v. Bennington Township*, 58 *Mich.*, 157 ; s. c., 24 *Northwestern Rep.*, 776, 778.

And see *People v. Mead*, 50 *Mich.*, 228 ; *People v. Cox*, 83 *N. Y.*, 610 ; aff'g 21 *Hun (N. Y.)*, 47 ; *Truitt v. State*, 8 *Tex. App.*, 148 ; *Tyler v. State*, 11 *Id.*, 388.

§ 459. — *uncertainty*.—If the impression of the witness

is based on personal knowledge or observation, lack of positiveness in testifying to identity does not alone render the testimony incompetent; but goes only to its weight.

*People v. Rolfe*, 61 *Cal.*, 540; s. c., 15 *Reporter*, 102.. (Robbery: as to identity of accused, witness expressed belief.)

*State v. Babb*, 76 *Mo.*, 501. (Larceny: identity of goods.)

*King v. N. Y. Central etc. R. R. Co.*, 72 *N. Y.*, 607 (holding that it is not error to allow the witness to be asked, have you any doubt whether this is the same?) [For other cases see note in 2 *Abb. N. C.*, 232.]

*Contra*: Compare *People v. Williams*, 29 *Hun (N. Y.)*, 522; s. c., 17 *N. Y. Weekly Dig.*, 356 (holding that a witness should not be allowed in the first instance, as evidence in chief to state "impressions" or "thoughts" in respect to the identity of a person, but only knowledge, recollection or memory of facts.)

*S. P., Rich v. Jones*, 63 *Mass.* (9 *Cush.*), 326 (where witness only "supposed" it was the same thing.)

[For interesting reviews of questions of mistaken identity, see 2 *Crim L. Mag.*, 287; 1 *Id.*, 1; 10 *Id.*, 725; and *Ram. on Facts*.

§ 460. *Photographs*, admissible for the purpose of interrogating a witness as to the identity of one absent or deceased.

*Ruloff v. People*, 45 *N. Y.*, 213 (identity of person found drowned).

*Marion v. State*, 20 *Neb.*, 233 (photograph of deceased taken before his death. The court say, although of little or no service in identifying the remains, it might be of importance in identifying the person last seen with the accused).

*Washington Life Ins. Co. v. Schaible*, 1 *W. N. C.*, 369 (colored photograph of the insured).

*Udderzook v. Commonwealth*, 76 *Pa. St.*, 340; s. c., 1 *Am. Crim. Rep.*, 11; 1 *Cent. L. J.*, 352 (photograph of the deceased received to aid identification of remains).

*Luke v. Calhoun County*, 52 *Ala.*, 115 (holding it error to exclude photograph taken in life, to identify the deceased as plaintiff's husband).

In *Wilcox v. Wilcox*, 10 *N. Y. State Rep.*, 746, it was held that copies of photographs shown to be correct, may be used equally as original photographs for this purpose).

§ 461. *Answering to name*.—Evidence of interview had at the proper place, with a person answering to the name, is competent.

Howard v. Holbrook, 9 *Bosw. (N. Y.)*, 237; s. c., 23 *How. Pr. (N. Y.)*, 64 (holding such evidence sufficient alone to sustain verdict).

Hunt v. Maybee, 7 *N. Y.*, 266.

See also ABSENCE; and FICTITIOUS PERSON.

§ 462. *Slight evidence.*—Evidence tending to show identity is not incompetent because slight or fragmentary, unless no other evidence is to be given.

Johnson v. Comm., 115 *Pa. St.*, 369; s. c., 7 *Central Rep.*, 608; 9 *Atl. Rep.*, 78; 20 *W. N. C.*, 1. (*Held*, that no matter how slight may be the inference of identity to be drawn from any single fact, it is admissible as a fragment of the material from which the induction is to be made.)

S. P., *Whart. Crim. Ev.*, 9 ed., § 27.

Another similar offence, competent for purpose of identifying the perpetrator. Goersen v. Comm., 99 *Pa. St.*, 388.

State v. Maxwell, 51 *Iowa*, 314.

Washington v. State, 8 *Tex. App.*, 377.

Billhead, and the name on it, without producing the paper. Roosevelt v. Eckard, 17 *Abb. N. C.*, 58; s. p., Comm. v. Blood, 11 *Gray (Mass.)*, 74.

Clothing, Early v. State, 9 *Tex. App.*, 476; and articles found upon the person, State v. Dickson, 78 *Mo.*, 438; and contents of valise found near the body, Campbell v. State, 8 *Tex. App.*, 84. [*Contra*, as to clothing where there was no evidence there had not been a change, People v. Simpson, 12 *Northwest. Rep.*, 662.]

And the clothes identified as those worn by the accused at the time of the crime, if preserved in the same condition, may be inspected by the jury. People v. Gonzalez, 35 *N. Y.*, 49.

Habits the same. Udderzook v. Comm., 76 *Pa. St.*, 340; s. c. 1 *Am. Crim. Rep.*, 311.

Hair found where the remains of deceased were, admissible as a circumstance tending to aid in the identification of his person. Marion v. State, 20 *Neb.*, 233.

Handwritings of each, and comparison between them. Bell v. Brewster, 44 *Ohio St.*, 690; s. c., 10 *Northeast. Rep.*, 679; S. P., Cluverius v. Comm., 81 *Va.*, 787; s. c., 10 *Va. L. J.*, 609. [*Contra*, article in 32 *Alb. L. J.*, 101.]

Physical characteristics, such as color of hair and whiskers, the measure of the body, the stature, absence of certain teeth, and marks on those remaining. Lindsay v. People, 63 *N. Y.*, 143; aff'g 5 *Hun (N. Y.)*, 104; s. c., more fully, 67 *Barb. (N. Y.)*, 548.

Identifying the hand or foot of a deceased person may be sufficient evidence of personal identity. People v. Graves, 5 *Park. Cr. (N. Y.)*, 134.

*Possession* of horse like the one ridden by the culprit, competent. *Williams v. State (Tex., 1887)*, 5 *Southwest. Rep.*, 655.

*Signature*, by name on one deed, and by mark on another, but slight evidence against identity. *Mackay v. Easton*, 19 *Wall. (U. S.)*, 619; s. c., 22 *Law. ed.*, 211.

*Sound of voice.* *Comm. v. Hayes*, 138 *Mass.*, 185; s. c., 19 *Reporter*, 306. So also of a dog's bark. *Wilbur v. Hubbard*, 35 *Barb. (N. Y.)*, 303.

*Tracks.* Evidence that the shoes of a person were of a size and shape that would make a track like that attributed to a particular person is competent as tending to show that the tracks were made by him. *People v. McCallam*, 3 *N. Y. Crim. R.*, 189; S. P., *Hotchkiss v. Germania Fire Ins. Co.*, 5 *Hun (N. Y.)*, 90. Also *People v. McCurdy*, 68 *Cal.*, 576; s. c., 10 *Pacific Rep.*, 207 (holding that the fact that the measurements of the footprints were made two weeks after the footprints were made, did not render the evidence incompetent).

For other instances, see *Criminal Trial Brief*, §§.

And an ordinary witness having testified to his examination of footprints and shoes may testify as to the correspondence between them. *Comm. v. Pope*, 103 *Mass.*, 440; S. P., *Comm. v. Sturtivant*, 117 *Id.*, 122; *Hotchkiss v. Germania Fire Ins. Co.*, 5 *Hun (N. Y.)*, 90.

Similarity of tracks of horse not alone enough. *State v. Melick*, 65 *Iowa*, 614; s. c., 22 *Northwest. Rep.*, 895.

§ 463. *Name as evidence of identity.*—Identity of name raises a legal presumption of identity of person, in the absence of anything, such as the commonness of some names, or evidence imputing different residences, or other circumstances, raising a doubt.<sup>1</sup>

The same principle applies to real property.<sup>2</sup>

<sup>1</sup> For the general rule as to *persons*, see: *Abb. Tr. Ev.*, 101, 695; *Crim. Brief*, 388, § 642; *Whart. Crim. Ev.*, 9 ed., 1884, § 459.

Identity of *surname* merely, not sufficient. *Fanning v. Lent*, 2 *E. D. Smith (N. Y.)*, 206.

But trivial difference in given name not enough to preclude the presumption—for instance, “William” instead of “Williams.”

*Rust v. Eckler*, 41 *N. Y.*, 488, 492, 496. (Name of commissioner to take deposition.)

A deed over fifty years old, from James Smith, of the county of Cape Girardeau, not to be excluded upon a presumption that it is not the deed of J. Smith, of Little Prairie, the owner of the land, where the iden-

tity is sufficiently stated in the body of the instrument. *Mackey v. Easton*, 19 *Wall. (U. S.)*, 619; s. c., 22 *Law. ed.*, 211.

Addition of an *alias* does not preclude the presumption.

*State v. Kelsoe*, 76 *Mo.*, 505 (name and alias in a former conviction).

*Instances.*—The presumption avails. to establish—

*Corpus delicti.*—*State v. Kilgore*, 70 *Mo.*, 546 (holding identity of name sufficient proof of identity of person killed).

*Death and survivorship*: Where there is evidence tending to show the place of residence and death of one partner, proof of the death at the same place of a person bearing the same name establishes, *prima facie*, the title of the other partner as survivor. *Daby v. Ericsson*, 45 *N. Y.*, 786.

*Liability on covenant*: *Lawrence v. Farley*, 24 *Hun (N. Y.)*, 293; s. c., 9 *Abb. N. C.*, 371. (Identity of person sued upon the assumption clause as grantee in a deed.)

—*on judgment*. In an action on a foreign judgment, the fact that defendant has the same name with him against whom the judgment was recovered, is presumptive evidence (and sufficient, no suspicious circumstances appearing) of his identity, and the judge at the trial may assume that fact without submitting it to the jury. *Hatcher v. Rocheleau*, 18 *N. Y.*, 86.

*Tracing titles*: Slight proof of identity of a grantor is sufficient in tracing titles. Identity of names is *prima facie* evidence of the identity of persons. *Stebbins v. Duncan*, 108 *U. S.*, 32; s. c., 27 *Law. ed.*, 641.

<sup>2</sup> *Lyon v. Adde*, 63 *Barb. (N. Y.)*, 89.

§ 464. *Oral evidence*, to show who was intended by the name in a written instrument, is not necessarily excluded by the rule against varying a writing by parol,<sup>1</sup> nor by the statute of frauds.<sup>2</sup>

<sup>1</sup> *Jacobs v. Benson*, 39 *Me.*, 132; s. c., 63 *Am. Dec.*, 609; *Berniaud v. Beecher*, 71 *Cal.*, 38; s. c., 11 *Pacific Rep.*, 802 (oral evidence that masculine pronoun was used by mistake for feminine, the given name being only represented by an initial).

<sup>2</sup> *Salmon Falls Mfg. Co. v. Goddard*, 15 *How. (U. S.)*, 446, 454; s. c., 14 *Law. ed.*, 493, 496 (sale of merchandise).

*McDuffie v. Clark*, 39 *Hun (N. Y.)*, 166 (deed of lands). And see *Rudick v. State*, 111 *Ind.*, 595; s. c., 10 *Western Rep.*, 838; 13 *Northeast. Rep.*, 114.

§ 465. *Commingled assets*.—Identity of fund traced through commingling of assets.

Hooley v. Greve, 9 *Abb. N. C.*, 8, 41; Note in 17 *Id.*, 160; Englar v. Offutt (*Md.*, 1889), 28 *Centr. L. J.*, 341 with note; Denton v. Merrill, 43 *Hun (N. Y.)*, 224, 229. And see DEPOSIT.

§ 466. *Rebuttal; testing witness.*—To rebut testimony of a witness to the identity of a person, the witness may be tested by pointing out a third person and interrogating the witness as to the resemblance of the latter to the one in question.

*Whart. Crim. Ev.*, 9 ed. (1884), § 808.

§ 467. — *inspection and experiment.*—One against whom evidence of physical peculiarities has been adduced as evidence of identity, has a right to submit himself to the inspection of the jury in rebuttal, if the peculiarities relied on are such that the evidence afforded thereby could not be made for the occasion, such, for instance, as the conformation of a limb.<sup>1</sup>

Otherwise of peculiarities that could be so produced, such as the tone of voice.<sup>2</sup>

<sup>1</sup> *Lipes v. State*, 15 *Lea. (Tenn.)*, 125; s. c., 54 *Am. Rep.*, 402 (error to refuse to allow accused to exhibit his feet).

: So it is error to refuse to allow evidence that he had not used shoes capable of making the tracks proved, *Stone v. State*, 12 *Tex. App.*, 219; or that the horse could not wear such shoes as to make the horse tracks proved, *State v. Melick*, 65 *Iowa*, 614; s. c., 22 *Northwest. Rep.*, 895.

<sup>2</sup> *Comm. v. Scott*, 123 *Mass.*, 222 (not error to refuse to allow him to prove his usual and natural voice, by using his voice in the court room.

[See also ABILITY and CONDITION.]

§ 468. — *existence of a "double."*—Whether it is competent to prove that a third person has been seen closely resembling the one in question, without producing such third person, see:

*Affirmative*: *White v. Comm.*, 15 *Reporter*, 84; s. c., 2 *Ky. L. J.*, 256.

*Negative*: *Comm. v. Webster*, 59 *Mass.*, 295.

§ 469. — *name.*—To disprove identity, it is not competent to show difference of name, without offering to show that a different person was intended.<sup>1</sup>



Existence of a person in one place is not disproved by evidence of previous death of one of the same name residing in another place.<sup>2</sup>

<sup>1</sup> *Rutherford v. State*, 13 *Tex. App.*, 92 (name of injured person, as stated in indictment).

*S. P., Comm. v. Gormley*, 133 *Mass.*, 580 (name of person to whom liquor was sold).

<sup>2</sup> *People v. Kline*, 44 *Mich.*, 290 (conviction for false pretences not sustainable).

ILLEGALITY.—[For kindred topics, see KNOWLEDGE, and INTENT.]

§ 470. *Oral evidence*.—The rule that oral evidence is not competent to vary a written contract, does not preclude oral evidence of legality,<sup>1</sup> or of illegality.<sup>2</sup>

<sup>1</sup> See § 277, p. 99, CONSIDERATION.

<sup>2</sup> *Cassard v. Hinman*, 1 *Bosw. (N. Y.)*, 207 (wager contract); and see *Brown v. Brown*, 34 *Barb. (N. Y.)*, 533 (lobby services).

*Contra: Dewey on Contr.*, 65, 66.

Whether illegality is available unless alleged, see 13 *Abb. N. C.*, 383; *Cary v. Western Union Tel. Co.*, *Hun (N. Y.)*, 610; s. c., with note 20 *Abb. N. C.*, 333, 342.

INDEBTEDNESS.—[For kindred topics, see ABSTRACTS, ACCOUNTS, ACCOUNT STATED, ADMISSIONS, CORROBORATION, PAYMENT, ACCORD AND SATISFACTION, COMPROMISE.]

§ 471. *State of account*.—When indirectly involved, may be testified to directly by a witness cognizant of it, without producing the books.

*Lewis v. Palmer*, 28 *N. Y.*, 271, 278. [See also ABSTRACTS and ACCOUNTS.]

INDUCEMENT.—[See also INTENT and GOOD FAITH.]

§ 472. *What would you have done?*—The rule that a witness may testify that he was induced to certain conduct by specified representations,<sup>1</sup> and that he believed the representations<sup>2</sup> does not allow him to be asked on direct examination, if he would have done so had no such representation been made.<sup>3</sup>

<sup>1</sup> *Hardt v. Schulting*, 13 *Hun (N. Y.)*, 537. [See also INTENT.]

<sup>2</sup> *McGrann v. Pittsburg etc. R. R. Co.*, 111 *Pa. St.*, 171; s. c., 2 *Centr. Rep.*, 565, 571. [See also GOOD FAITH.]

<sup>3</sup> *Benedict v. Penfield*, 42 *Hun (N. Y.)*, 176.

*Learned v. Ryder*, 61 *Barb. (N. Y.)*, 552; s. c., 5 *Lans. (N. Y.)*, 539.

Much less what others would have done. *Northwestern Ben. Mut. Aid Asso. v. Hall*, 16 *Ins. L. J.*, 218.

INFANCY.—[For cognate topics, see AGE and BIRTH.]

§ 473. *Admission.*—Against an infant when he is a party, his own admission of being a minor is competent.

*People v. Tripp*, 4 *N. Y. Leg. Obs.*, 344 (indictment for offering to vote).

INSOLVENCY, SOLVENCY and FINANCIAL CONDITION.—[For kindred topics, see ABILITY, ABSTRACTS, ACCOUNTS and INDEBTEDNESS.].

§ 474. Direct testimony.

475. Accounts.

476. Relevant facts.

§ 477. Hearsay and general reputation.

478. Presumption.

§ 474. *Direct testimony.*—A witness may testify directly to any fact within his knowledge, relevant to the question of the financial means of another person, including the fact whether the person in question was able to pay his debts.<sup>1</sup>

But it is not competent to ask his opinion as to financial ability,<sup>2</sup> responsibility,<sup>3</sup> solvency or insolvency,<sup>4</sup> when the fact is directly involved in the issue.

<sup>1</sup> *Thompson v. Hall*, 45 *Barb. (N. Y.)*, 214, 216.

What degree of knowledge of a person's solvency or pecuniary circumstances and credit, will qualify to testify concerning them. *Iselin v. Peck*, 2 *Robt. (N. Y.)*, 629.

<sup>2</sup> *Dictum*, in *Thompson v. Hall (above cited)*.

<sup>3</sup> *Denman v. Campbell*, 7 *Hun (N. Y.)*, 88 (error to allow question; is C. a man of responsibility?).

<sup>4</sup> *York v. People*, 31 *Hun (N. Y.)*, 446 (error to allow question, what in your opinion was his financial standing, in, etc.?).

§ 475. *Accounts.*—The accounts of a party are evidence against him to show his financial condition.<sup>1</sup>

They are not alone evidence in his favor;<sup>2</sup> but may be made competent by proof that they were accurately kept, and showed correctly his condition at the time in question.<sup>3</sup>

<sup>1</sup> They *may* be put in evidence in some cases against his grantee. *Loos v. Wilkinson*, 110 *N. Y.*, 195, 205.

<sup>2</sup> *Smith v. Vincent*, 15 *Conn.*, 1; s. c., 38 *Am. Dec.*, 52.

<sup>3</sup> *Rochester Printing Co. v. Loomis*, 45 *Hun (N. Y.)*, 93 (admitting schedules made from such accounts; there being no objection to the non-production of the accounts. Compare, *Pringle v. Leverich*, 97 *N. Y.*, 181).

§ 476. *Relevant facts.*—Facts which are the usual concomitants or consequences of pecuniary ability, or the contrary, are competent.

*Abb. Tr. Ev.*, 616.

*Illustrations*: *Terry v. Tubman*, 92 *U. S.*, 156, 160; s. c., 23 *Law. ed.*, 537. (Judgment and execution are evidence of insolvency, so also of assignment, and continued suspension of business or other notorious indications.)

*S. P., Reynolds v. Pharr*, 9 *Ala.*, 560.

*Yates v. Hoffman*, 5 *Hun (N. Y.)*, 113 (sheriff's return of *nulla bona*).

*Brown v. Montgomery*, 20 *N. Y.*, 287 (dishonor of a bank check).

*Cunningham v. Morton*, 125 *U. S.*, 77 (assignment, reciting inability to pay in full).

*S. P., Scammon v. Cole*, (*Dist. Ct. Me.*, 1869), 1 *Hask.*, 214.

Compare *Wills v. Claffin*, 92 *U. S.*, 135; s. c., 23 *Law. ed.*, 490 (holding an adjudication of bankruptcy inadmissible under an allegation that a suit would have been unavailing).

§ 477. *Hearsay*<sup>1</sup> and *general reputation*<sup>2</sup> are incompetent to prove the fact of solvency or insolvency; but when the question is on the knowledge or good faith of a third person, general reputation is competent as tending to show reasonable grounds for belief or suspicion.<sup>3</sup>

<sup>1</sup> *Walker v. Forbes*, 25 *Ala.*, 139; s. c., 60 *Am. Dec.*, 498.

<sup>2</sup> *Stewart v. McMurray*, 82 *Ala.*, 269; s. c., 3 *Southern Rep.*, 47.

<sup>3</sup> *Hall v. Ritenour* (*Mo.*, 1885), 2 *Western Rep.*, 496, 498, and *cas. cit.*

*Lee v. Kilburn*, 69 *Mass.* (3 *Gray*), 594 (competent in creditor's action, to charge preferred creditor).

*Slingerland v. Bennett*, 6 *N. Y. Supm. Ct. (T. & C.)*, 446. (Reputation of third person for wealth, admissible on the question of the falsity of the representations by defendant as to his solvency.) [Modified only on question of damages, in 66 *N. Y.*, 611]

*Barrett v. Western*, 66 *Barb. (N. Y.)*, 205 (reputation competent in connection with defendant's belief).

§ 478. *Presumption*.—In the absence of evidence, solvency is presumed.<sup>1</sup>

And solvency or insolvency at a given time having been shown, it is presumed to continue within reasonable limits of time.<sup>2</sup>

<sup>1</sup> *Hart v. Hoffman*, 44 *How. Fr. (N. Y.)*, 168 (solvency of purchaser procured by broker, presumed, in support of broker's action for compensation).

*Hackley v. Draper*, 4 *N. Y. Supm. Ct. (T. & C.)*, 614; aff'd in 60 *N. Y.*, 88.

<sup>2</sup> *Wait on Insolv. Corp.*, 42, citing *Waldrod v. Ball*, 9 *Barb. (N. Y.)*, 271; *Donahue v. Coleman*, 49 *Conn.*, 464; *Mullen v. Pryor*, 12 *Mo.*, 307; *Body v. Jewsen*, 33 *Wisc.*, 402.

INTENT.—[For kindred topics, see BELIEF, GOOD FAITH, ADMISSIONS, CONVERSATIONS, KNOWLEDGE, NOTICE, CORROBORATION.]

§ 479. Direct testimony, to own intent.—§ 484. Presumptive intention as to consequences.

480. — at present time.

485. Constructive intent.

481. — of third person.

486. Intent as to law.

482. — manifested by demeanor.

487. Other acts of same nature.

483. Declarations. *Res gestæ*.

488. Concurrence of intent.

489. Rebutting.

§ 479. *Direct testimony, to own intent*.—Under the rule that where actual intent is material, a party may testify to his own intent;<sup>1</sup> an officer of a corporation may testify to the intent with which its transactions under his official cognizance were done.<sup>2</sup>

<sup>1</sup> See the leading authorities in *Civil Jury Brief*, p. 93; and *Criminal Brief*, 366, § 611, etc.

15 *Alb. L. J.*, 385.

For cases where questions calling for undisclosed intention or object, are immaterial, see *Cowdrey v. Coit*, 44 *N. Y.*, 382; rev'g 3 *Robt. (N. Y.)*, 210.

<sup>2</sup> Common Practice.

*S. P.*, Natl. Bk. of Metrop. *v. Kennedy*, 17 *Wall. (U. S.)*, 19, 29; s. c., 21 *Law. ed.*, 554.

So under an indictment for burning a building "erected for the manufacturing of woolen goods," it appearing that the building was unfinished, the purpose of its erection may be proved by the president. *McGarry v. People*, 2 *Lans. (N. Y.)*, 227.

§ 480. — *at present time.*—When present intent is relevant, as where an injunction is sought, the party testifying as a witness may be required to answer whether he intends to do the act in question.

*Heilbron v. Last Chance W. D. Co. (Cal., 1886), 9 Pacific Rep., 456.*

§ 481. — *of third person.*—A witness may not testify as to the motive or intent of another person; but that is to be shown by circumstances, and the declarations of such other person<sup>1</sup> or by his own testimony.

<sup>1</sup> *Manufacturers' etc. Bk. of Buffalo v. Koch, 105 N. Y., 630; s. c., more fully, 8 N. Y. State Rep., 37.*

*Cihak v. Kleke, 117 Ill., 643; s. c., 7 Northeast. Rep., 111, 114 (husband cannot testify what was wife's intention as to reservation or dedication of land).*

A witness cannot be asked if he knew of any unfair act done by a trustee to procure a sale to himself. *Red Jacket Tribe v. Gibson, 70 Cal. 128; s. c., 12 Pacific Rep., 127.*

§ 482. — *manifested by demeanor.*—A witness may testify to his impression that one combatant in a struggle he witnessed was not choking the other, but it was a friendly grasp.

*Blake v. People, 73 N. Y., 586. [See also FEELINGS.]*

As to the competency of the understanding of a witness as to significance of expressions, gestures and intonations, see BELIEF, and SIGNS AND SIGNALS; and *Criminal Brief, 325, § 563.*

Opinion of witness as to object of transaction with third person, inadmissible. *People v. Sharp, 107 N. Y., 427; s. c., 14 Northeast. Rep., 310; rev'g 45 Hun, (N. Y.), 460.*

§ 483. *Declarations—res gestæ.*—For the conflict of authority as to whether one person's declarations of intent are competent against another person, merely because part of the *res gestæ* of an act of the former in the absence of the latter, see :

*Criminal Trial Brief, §§ 628–636; 21 Alb. L. J., 484, 504; 22 Id., 4; Nowell v. Mayor etc., 52 N. Y. Super. Ct. (J. & S.), 382; Wilcox v. Green, 23 Barb. (N. Y.), 639, 643, n., and cases cited under ABSENCE.*

Competency of threats to show intent, etc.; *Criminal Trial Brief, 407, § 673, etc.; although long previous, Id., 408, § 673; 408, § 674.*

§ 484. *Presumptive intention as to consequences.*—The presumption that one intended the necessary consequences of his act,<sup>1</sup> may be rebutted.<sup>2</sup>

<sup>1</sup> Van Pelt v. McGraw, 4 N. Y., 110.

First Natl. Bk. of Clarion v. Jones, 21 Wall. (U. S.), 325; s. c., 22 Law. ed., 542.

<sup>2</sup> Filkins v. People, 69 N. Y., 101; s. c., 25 Am. Rep., 143; rev'g People v. Filkins, 1 Buff. Super. Ct. (Sheldon), 504.

§ 485. *Constructive intent.*—The law may in some cases impute to parties to a contract an intent which it is clear never in fact existed.

Dillinbeck v. Dygert, 97 N. Y., 303, 312 (holding, in support of an assignment, that it transferred a different claim than the one the parties had in mind).

S. P., Lowman v. Lowman, 118 Ill., 582; s. c., 6 Western Rep., 689.

§ 486. *Intent as to law.*—In a contract involving matters in several jurisdictions, if there is no express declaration which law shall control, the fact that the contract will be valid by the law of one jurisdiction and invalid by the law of another, is sufficient evidence of intent that that law shall control which will sustain the contract.

New England Mort. Security Co. v. Vader, 28 Fed. Rep., 265; s. c., 22 Reporter, 676; and see Brown v. Am. Financier Co., 19 Abb. N. C., 305. [Compare Liverpool S. S. Co. v. Phenix Ins. Co., 129; U. S., 397, 448, for the general rule.]

§ 487. *Other acts of same nature may be competent to show intent.*

Mut. Life Ins. Co. v. Armstrong, 117 U. S., 591; s. c., 29 Law. ed., 997; Criminal Brief, 358, § 599.

[The test of competency is whether they show the existence of the same motive actuating connected conduct, in which case they are competent, or only the same disposition manifesting itself under other circumstances, in which case they are not competent to show intent, although sometimes may be to negative ACCIDENT, or to show CHARACTER, or HABIT, which see.]

For presumption that intent continues, see Criminal Brief, 359, § 601; 408, § 674.

§ 488. *Concurrence of intent.*—Where it is necessary to prove concurrence of intent,—as in an illegal agreement,

—the intent of each person may be proved by independent evidence; and evidence which shows the intent of one person is not incompetent, merely because it is no evidence of the intent of the other, provided appropriate evidence of the intent of the other be given in due course.

*Abb. Tr. Ev.*, 739, note 5.

*Yerkes vs. Saloman*, 11 *Hun* (N. Y.), 471.

Intent of one not presumed from that of the other.

*Bangs v. Hornick*, 30 *Fed. Rep.*, 97; s. c., 23 *Reporter*, 647.

§ 489. *Rebutting.*—A party to whom a wrongful intent, or one that tends to render him liable in the action, is imputed, has the right to prove the actual intent by way of contradiction, although it be otherwise irrelevant.

*Tracy v. McManus*, 58 *N. Y.*, 257. (One sought to be charged as a partner by equivocal acts, may testify that his motive in doing what he did was to aid two of his relatives who were members of the firm.)

*Macy v. St. Paul etc. Ry. Co.*, 35 *Minn.*, 200; s. c., 28 *Northwest. Rep.*, 249 (servant suing employer for injury, after a year's silence, allowed to explain his delay by testifying that he was afraid he should lose his place).

*Comm. v. Wellington*, 146 *Mass.*, 566; s. c., 6 *New Eng. Rep.*, 205 (reversing conviction for keeping liquor with intent to sell, because the court excluded evidence that defendant had a pending application for license, offered to negative criminal intent).

*Woodruff v. Hurson*, 32 *Barb.* (N. Y.), 557, 564. (ALLEN, J. To repel the inference of malice from evidence of threats to injure, it is competent to give evidence of friendly acts and relations.)

*Persse & Brooks Paper Works v. Willett*, 1 *Robt.* (N. Y.), 131; s. c., 19 *Abb. Pr.*, 416 (holding that the witness may state the particular reasons which induced an act alleged to be fraudulent as to creditors, and that he communicated those reasons to his creditors before the act).

For other illustrations see *Criminal Brief*, 231, § 393; 302, § 519; 376, § 625.

INTEREST.—[For kindred topics, see ACCOUNTS, ACCOUNT STATED, DATE and USAGE.]

§ 490. *Previous understanding.*—To justify a peculiar manner of computing interest in an account, it is competent to show that the party making the charge, fully explained

to the other his mode of making interest computations and of charging interest, as an illustration of the manner in which they proposed to conduct the business under the contract, as they were about to make the contract.

*Manchester Paper Co. v. Moore*, 104 *N. Y.*, 680. To entitle to interest on unliquidated account without promise to pay it, show either usage of the trade, *Liotard v. Graves*, 3 *Cai.*, 226, or practice of the particular house, and previous dealings with it by the debtor. *Reab v. McAllister*, 8 *Wend. (N. Y.)*, 109; aff'g 4 *Id.*, 483.

INTOXICATION.—[See also HABIT and CHARACTER.]

§ 491. Direct testimony.

§ 493. Intemperate habits.

492. Customary manner of acting.

§ 491. *Direct testimony*.—A witness who had adequate opportunity of observation,<sup>1</sup> may testify directly whether a person whom he saw was intoxicated, or appeared to be under the influence of liquor.

<sup>1</sup> *People v. Eastwood*, 14 *N. Y.*, 562; aff'g 3 *Park Cr. (N. Y.)*, 25 (leading case).

*Comm. v. Sturtivant*, 117 *Mass.*, 122 (*dictum*).

*Bradley v. Second Ave. R. R. Co.*, 8 *Daly (N. Y.)*, 289. (Action for negligence causing death. Testimony that the deceased came "staggering over to catch the horses by the heads; he seemed to me to be drunk, but I could not say positively that he was." *Held*, sufficient to go to the jury.)

§ 492. *Customary manner of acting*.—It is competent to show how a person was accustomed to act when intoxicated on other occasions, for the purpose of giving character to acts relied on as evidence of intoxication.

*State v. Hoxford*, 47 *Iowa*, 16.

*Upstone v. People*, 109 *Ill.*, 169. (Murder: defense, insanity. It was shown on behalf of the accused that he was intoxicated at the time of the homicide. *Held*, proper to permit the prosecution to introduce evidence of previous intoxication as bearing on the question of intoxication at the time of the killing and of the conduct of the accused while in that state.)

§ 493. *Intemperate habits*.—Evidence of general intemperate habits is not, alone, competent as showing actual intoxication at a particular time;<sup>1</sup> but is competent (and so is an adjudication of habitual drunkenness had under the



statute), as showing susceptibility to fraud or undue influence at a particular time.<sup>2</sup>

<sup>1</sup> *Hampson v. Taylor*, 15 *R. I.*, 83; s. c., 3 *New. Eng. Rep.*, 640 (intoxication as showing contributory negligence).

*Hubbard v. Mason City*, 60 *Iowa*, 400; s. c., 14 *Northwest. Rep.*, 772.

<sup>2</sup> *Stirling v. Hinckley* (*Pa.*, 1886), 2 *Central Rep.*, 824 (suit to overhaul contract).

How near the time to which the evidence relates must be to the time in issue, depends on the nature of the issue: see *State v. Hubbard*, 60 *Iowa*, 466; s. c., 15 *Northwest. Rep.*, 287 (holding in criminal prosecution for selling to intoxicated person, that intoxication six hours after the sale was not enough); and *State v. Pierce*, 65 *Iowa*, 85; s. c., 21 *Northwest. Rep.*, 195 (holding that intoxication after leaving saloon is competent as tending to show he became intoxicated there).

*People v. O'Neil*, 112 *N. Y.*, 355; s. c., 19 *Northeast. Rep.*, 796, 800. (As part of the conduct or demeanor which is competent, the fact that one accused of arson was, at a time subsequent to the fire and some days previous, drinking a good deal, is competent.)

## JUDICIAL KNOWLEDGE.

§ 494. *To aid the court*, a document which is a proper source of general information for the purpose, may be handed up to the judge.

See *Case v. Perew*, 46 *Hun* (*N. Y.*), 57. (Holding that receiving an almanac as evidence was not error, for it might with the same effect have been received to refresh the memory of the court or jury.)

KNOWLEDGE.—[See also ASS'NT, BELIEF, GOOD FAITH, INTENT, MALICE, and MOTIVE.]

§ 495. Direct testimony.

496. Probability of knowledge.

497. Circumstantial evidence.

498. Possession.

499. Knowledge of contents presumed from signing or receiving.

500. — from access or from claim.

§ 501. Newspaper contents.

502. General reputation.

503. Presumptions: common fact.

504. — continuing body.

505. Corporate business.

506. Knowledge of law.

507. — of foreign law.

§ 495. *Direct testimony.*—Where knowledge is material, a person may testify directly as to whether or not he had knowledge;<sup>1</sup> but not (unless an expert)<sup>2</sup> as to whether an

other person had knowledge;<sup>3</sup> nor can the witness be asked whether he gave another person to understand that a fact existed.<sup>4</sup>

<sup>1</sup> *Frost v. Rosecrans*, 66 *Iowa*, 405; s. c., 23 *Northwest. Rep.*, 895. (Action to set aside deed in fraud of creditors. Error to exclude question put to alleged purchaser for value.)

*Turner v. Keller*, 66 *N. Y.*, 66. (On the question of knowledge of want of authority, it is competent to ask whether at the time of the transaction the witness supposed the alleged agent had authority.)

*S. P., Dutchess Ins. Co. v. Hachfield*, 73 *N. Y.*, 226 (witness may testify whether he believed an explanation).

<sup>2</sup> *Beckwith v. N. Y. Central R. R. Co.*, 64 *Barb. (N. Y.)*, 299; *Macer v. Third Ave. R. R. Co.*, 47 *N. Y. Super. Ct. (J. & S.)* 461. (Question allowed whether the sufferer was aware that the witness was watching his movements.) [See also *FEELINGS*.]

<sup>3</sup> *Major v. Spies*, 66 *Barb. (N. Y.)*, 576. (Defendant not allowed to testify in his own behalf that plaintiff, suing for value of services, knew defendant had nothing to do with the work.)

*Wallis v. Randall*, 81 *N. Y.*, 164, 170. (*Dictum*.)

[Where knowledge is only incidentally in question it is usual to allow a question as to another person having knowledge, subject to cross-examination as to the witness' means of information.]

<sup>4</sup> *Blaut v. Gabler*, 77 *N. Y.*, 461. (Not error to exclude such question, even when put to an alleged fraudulent assignor, as bearing on the question whether the assignee had notice of intent to defraud creditors.)

§ 496. *Probability of knowledge*.—An expert may be asked whether, if a fact existed, a person under given circumstances would be likely to know it, if the question requires special knowledge or experience, so that the jury could not make inference for themselves.<sup>1</sup> Otherwise not.<sup>2</sup>

<sup>1</sup> *Perkins v. Augusta Ins. Co.*, 76 *Mass. (10 Gray)*, 312; s. c., 71 *Am. Dec.*, 654. (Not error to refuse to allow expert to be asked if master of vessel would know if his mast was sprung, his sails split, etc.)

*Odell v. Solomon*, 55 *N. Y. Super. Ct. (J. & S.)*, 410. (Expert not allowed to testify as to a man being able to tell from exterior appearances that a sash was going to fall down.)

*Jupitz v. People*, 34 *Ill.*, 516, 521. (Indictment for receiving stolen goods. On question of knowledge of

value, machinists and brass finishers are competent to state that from common observation and without close inspection, it could not be told whether certain brass couplings were perfect or imperfect, and useful, or only old brass.)

*Cook v. Castner*, 63 *Mass.* (9 *Cush.*), 266 (whether decay could have been discovered on removal of covering).

<sup>2</sup> *Gilbert v. Guild*, 144 *Mass.*, 601; s. c., 12 *Northeast. Rep.*, 368. (Question whether the danger of manipulating a cutting machine would be obvious to one operating it.)

§ 497. *Circumstantial evidence.*—The fact of knowledge may be established by circumstantial evidence, even where it is necessary to show actual knowledge;<sup>1</sup> and for this purpose evidence of previous transactions is competent.<sup>2</sup>

<sup>1</sup> *Parker v. Conner*, 93 *N. Y.*, 118, 124. (*Dictum.*)

<sup>2</sup> For numerous illustrations see *Criminal Brief*, 348, etc. *Verona Central Cheese Co. v. Murtaugh*, 50 *N. Y.*, 314; rev'g 4 *Lans. (N. Y.)*, 17; *Cowley v. People*, 8 *Abb. N. C.*, 1, 2, note; aff'd in 83 *N. Y.*, 464; s. c., 38 *Am. Rep.*, 464, with note.

*Douglass v. Ireland*, 73 *N. Y.*, 100. (Knowledge and guilty action of trustees illegally issuing stock of a company for the purchase of property.)

The same class of evidence is admissible in favor of the party to be charged with knowledge.

*People v. Dowling*, 84 *N. Y.*, 478. (*Held*, error to refuse to allow the prisoner to prove what was said as to mode of obtaining property by the persons from whom he was alleged to have made the purchase. Also error, after the prosecution had proved the finding of other goods in the prisoner's house and had introduced evidence to show that they were received with guilty knowledge, to refuse to allow him to testify that he had purchased those goods and had asked persons from whom he bought them to go and look at them.)

<sup>2</sup> Knowledge of insanity of one contracting party, by the other, can be proved by prior and subsequent conduct tending to show such insanity. *Beavan v. McDonnell*, 23 *L. J. Ex.*, 326. (Here the evidence admitted was of acts prior to making of contract, and partly prior to any acquaintance between the parties, as well as subsequent acts:—*held*, proper on ground "that if party was insane either just before or just after the contract, it raises an inference that defendant must have known it," it is evidence).

Where the object is to prove that a person responsible for the acts of another knew the latter's incapacity, proof of knowledge of prior acts of the latter showing incapacity is admissible. *Baulec v. N. Y. & H. R. R. Co.*, 59 *N. Y.*, 356 (laying down the rule as above and holding that it did not cover that case, where but one prior act of negligence was proved, and no evidence of knowledge of it by defendant was given).

Compare, *Frazier v. Penn. R. R. Co.*, 38 *Pa. St.*, 104.

§ 498. *Possession*.—Evidence that articles were found in a person's room is sufficient to go to the jury, to sustain an inference that they were there with his knowledge.

Ruloff's Case, 11 *Abb. Pr. (N. S.)*, 245; s. c., less fully as *Ruloff v. People*, 45 *N. Y.*, 213.

§ 499. *Knowledge of contents presumed from signing or receiving*.—Proof that one signed an instrument is sufficient evidence that he was acquainted with its contents.<sup>1</sup> So is proof that he accepted an instrument delivered to him as affecting his interest.<sup>2</sup>

This is a presumption of law which in the absence of other evidence concludes the question.

<sup>1</sup> *Harris v. Story*, 2 *E. D. Smith (N. Y.)*, 363 (signature by mark).

*Cooper v. Cooper*, *L. R.* 20 *Ch. Div.*, 611, 629 (where a son who had same initials as his father, had signed a deed mortgaging land belonging to his father and so described in deed, held that he had done so knowingly and with intent to personate his father).

*Guardhouse v. Blackburn*, *L. R.* 1 *Pro. & Div.*, 109. (Holding, in case of a will, that the presumption is conclusive if it is also shown that the will has been read over to a competent testator, although the solicitor who drew the will swore that the words had been inserted without instructions and by his inadvertence.

Rule is criticised in *Taylor on Evidence*, 179 *ed.*, 1886.)

*Parsons v. Boyd*, 20 *Ala.*, 112 (attorney charged with notice of a title to real property set out in a plea signed by his firm).

Such presumption may be rebutted by proving forgery or that the will was falsely read over to party signing it. *Doran v. Mullen*, 78 *Ill.*, 342 (affirming judgment admitting will to probate in the absence of such evidence).

And also by suspicious circumstances, such as, in the case of a will, that the instrument was drawn by a party interested in it. *Lake v. Ranney*, 33 *Barb. (N. Y.)*, 50, 68. In such a case there must be some affirma-

tive evidence that the testator "knew the contents of the will and that it expressed his real intention." *Paine v. Hall*, 18 *Ves. Jr.*, 475.

But the presumption cannot be rebutted by pleading, without alleging fraud, that the instrument was not read by the party signing it, nor by showing that untrue representations as to its legal effect were made. *Linington v. Strong*, 111 *Ill.*, 152 (charge to jury that party not excused to sign without reading unless induced by wilfully false representations held proper). *Hazard v. Griswold*, 21 *Fed. Rep.*, 178 (demurrer to a plea that the writing on which suit was brought was a bail bond, sustained). *McKinney v. Herrick*, 66 *Iowa*, 414; s. c., 23 *Northwest. Rep.*, 767 (allegation in answer, that instrument was not read by defendant, held demurrable).

§ 500. — *from access or from claim.*—The mere fact of having an interest in a document and having had access to it, although it generally avails to make the instrument competent against the party without further evidence to bring it home to him,<sup>1</sup> does not alone avail to raise a presumption of his having knowledge at any particular time of matters stated therein.<sup>2</sup>

But if he had an interest and some authority, in reference to the making of the instrument or entries therein, and neglected to inform himself when he should have done so, he may be charged with knowledge.<sup>3</sup>

If his claim in the action depends on the instrument, and the instrument is produced from his possession, there is a legal presumption that he was acquainted with its contents<sup>4</sup> which, however, is not conclusive in the absence of anything to raise an estoppel.

<sup>1</sup> Thus the rules of a club are competent against a member without further evidence of his knowledge of them; for a member of a club is presumed to know its rules; *Raggett v. Musgrave*, 2 *Carr & P.*, 556.

So Lloyd's lists were competent against an underwriter who had access to them, for he is presumed to know their contents; *Mackintosh v. Marshall*, 11 *Mees. & W.*, 116; *S. P.*, next section, n. 1.

<sup>2</sup> This seems to be the principle underlying *Mackintosh v. Marshall* (*above cited*), where it was held error not to charge that the presumption that the underwriter knew the contents of an entry in Lloyd's list before taking a risk was rebutted by evidence that the risk was one he would not have taken had he known the entry.

<sup>3</sup> *Brisbane v. Brisbane*, 11 *Reporter*, 587 (co-tenant who settled by the accounts kept by a common agent to which he had access, precluded from showing his ignorance of facts).

<sup>4</sup> *Mead v. Parker*, 29 *Hun (N.Y.)*, 62, and cases cited. Compare *Danby v. Coutts*, 33 *Weekly Rep.*, 559 (recital in power of attorney). See also *Smith v. Burgess*, 133 *Mass.*, 511; s. c., 15 *Reporter*, 50 (where the word "trustee" in a mortgage, though cancelled, was held notice to assignee, although there was no corresponding word in the note to which the mortgage was collateral).

§ 501. *Newspaper contents*.—The fact that one was a subscriber for and took a newspaper, does not charge him with knowledge of information,<sup>1</sup> or advertisements<sup>2</sup> contained therein.

<sup>1</sup> *Milbank v. Dennistoun*, 10 *Bosw. (N. Y.)*, 382 (an action against factors for selling below price without waiting for a rise).

In *Abel v. Potts*, 3 *Esp.*, 242, it was held that Lloyd's books, coupled with evidence that the person subscribed to Lloyd's and daily examined the books, may go to jury, as evidence of notice to him of a fact there stated.

<sup>2</sup> *Watkinson v. Bank of Penn.*, 4 *Whart. (Penn.)*, 482; s. c., 34 *Am. Dec.*, 521.

*Vernon v. Manhattan Co.*, 17 *Wend. (N. Y.)*, 524; aff'd 22 *Id.*, 183.

§ 502. *General reputation*.—On the question whether a person had knowledge of a fact, general reputation of the fact or of the contrary is competent.

*State v. Flint*, 60 *Vt.*, 304; s. c., 6 *New. Engl. Rep.*, 529; 14 *Atlantic Rep.*, 178. (Evidence of the notoriety of a crime is admissible as tending to show defendant's knowledge of it at a time when he claims that he had not heard of it.)

S. P., *Reilly v. Hannibal & St. J. R. Co.*, 94 *Mo.*, 600; s. c., 13 *Western Rep.*, 662; 7 *Southwest. Rep.*, 407.

S. P., *Pressler v. State*, 13 *Tex. App.*, 95 (general report circulated by a young man that he had attained majority competent, as corroborating defendant's denial of knowledge that he was a minor).

See also *INSOLVENCY*, § 477, and *Abb. Tr. Ev.*, 593 (master's knowledge of unfitness of servant).

[*Contra*, *Greenslade v. Dare*, 20 *Beav.*, 284 (holding that evidence inadmissible to prove the fact itself, is inadmissible to prove knowledge of such fact).

§ 503. *Presumptions,—common fact.*—Knowledge is presumed of facts generally understood by persons of mature years and of ordinary intelligence.

*Lanigan v. N. Y. Gas Light Co.*, 71 N. Y., 29 (explosive quality of illuminating gas).

§ 504. — *continuing body.*—A corporation is chargeable with knowledge of matters appearing upon its record, notwithstanding changes in the individuals composing the body.

*Albany City Nat'l Bank v. City of Albany*, 92 N. Y., 363.

*S. P., McAlpine v. Union Pacific Ry. Co.*, 23 *Fed. Rep.*, 168 ; s. c., 19 *Reporter*, 552 (holding corporate record of a contract, notice to consolidated corporation subsequently formed).

§ 505. *Corporate business.* — A person dealing with a corporation is bound to know the purpose for which it exists; and when he deals with its agents or officers to know their powers, and the extent of their authority.<sup>1</sup>

Directors and officers are presumed to have known what they ought by proper diligence to have known.<sup>2</sup>

<sup>1</sup> *Alexander v. Cauldwell*, 83 N. Y., 480, 485.

See also *Abb. Trial. Ev.*, 32, 40.

As to whether he may be presumed to know its regulations, see 2 *Sherm. and Redf. on Negl.*, § 549, p. 400.

<sup>2</sup> *Martin v. Webb*, 110 U. S., 7; s. c., 28 *Law. ed.*, 49.

§ 506. *Knowledge of law.*—The presumption of knowledge of the law does not preclude a party from proving that the adverse party deceived him by misrepresenting the law.

*O'Niel v. Lake Superior Iron Co.*, 63 *Mich.*, 690; s. c., 6 *Western Rep.*, 624.

§ 507. — *of foreign law.*—The rule that all persons are presumed to know the law, does not apply to charge citizens and residents of another state, acting there, with knowledge of the law of this state,<sup>1</sup> nor citizens and residents of this state, acting here, with a knowledge of the law of another state;<sup>2</sup> except where they claim under an instrument the existence of which depended on authority given by the law in question.<sup>3</sup>

- <sup>1</sup> *Merchants Bank v. Spalding*, 9 *N. Y.*, 53; aff'g 12 *Barb.* (*N. Y.*). 302 (contract of bankers, etc., of another state, contravening banking law of this state).  
*Honegger v. Wettstein*, 13 *Abb. N. C.*, 393, 399 (foreigners not chargeable with knowledge of our revenue law).
- <sup>2</sup> *Stedman v. Davis*, 93 *N. Y.*, 32 (reversing a decision that judgment creditors of a foreign debtor, who had made an assignment invalid under the foreign law, having accepted benefits under it, must be considered as having elected to treat it as valid, although there was no evidence that they had any knowledge of the foreign law).
- <sup>3</sup> Knowledge of the powers contained in the charter of a corporation existing in another state, must be imputed to a citizen of New York purchasing property the title to which is derived from a conveyance or assignment made by such corporation. *Wait on Insolv. Corp.*, 271.  
*S. P., Morgan v. United States*, 113 *U. S.*, 476 (holding that a holder of government bonds, is presumed to know whatever has lawfully been done or declared by the government respecting them).

LEAVE TO SUE.—[As to orders of court generally, see ORDER.]

§ 508. *Receiver*.—To prove the authority of a receiver of a corporation to sue, it is sufficient to produce the petition, the order appointing him receiver, and his official bond.

*Palmer v. Clark*, 4 *Abb. N. C.*, 25.

In 18 *Abb. N. C.*, 149, will be found a note on leave to sue. Leave may be granted nunc pro tunc, even after the commencement of the action except perhaps in those cases where leave is essential to the right of action, and the action is a common law action. As to the form of application and order see 1 *Abb. New. Pr. & F.*, 544, 556, etc.

LETTERS.—[For kindred topics, see ADMISSIONS, MAILS, and NOTICE.]

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|---|---|
| § 509. Offering part of connected correspondence. | 512. Letter and enclosures let in each other. |
| 510. Proof of authorship.                         | 513. Letters of an agent.                     |
| 511. Delivery,—mailing.                           | 514. Mere possession.                         |
|   | 515. Omission to answer.                      |

§ 509. *Offering part of connected correspondence*.—A party may put in evidence a letter containing admissions material to the case without putting in the whole correspondence.



Barrymore *v.* Taylor, 1 *Esp.*, 326.

Stone *v.* Sanborn, 104 *Mass.*, 319; *Abb. Tr. Ev.*, 677.

[*Contra*, *Summons v. Haas*, 56 *Md.*, 153; s. c., 11 *Rep.*, 840.]

*Contra*. A party is not entitled to put in evidence his own letter against the adverse party, if it purports to have been written in answer to one from the adverse party, unless he offers at the same time to prove or account for the one from the adverse party. *Heatherington v. Richter* (*W. Va.*, 1888), abst. s. c., 39 *Alb. L. J.*, 420; citing *Walson v. Moore*, 1 *Conn. & K.*, 626; s. c., 47 *Eng. Com. L.*, 626; *Brisban v. Boyd*, 4 *Paige* (*N. Y.*), 17.

§ 510. *Proof of authorship*.—A letter is not made admissible against the apparent writer by evidence that it was received in due course purporting to have been mailed at the place of his residence, without proof that he either wrote or authorized it.<sup>1</sup> But it is made admissible by evidence that it was so received in answer to a letter previously sent to him.<sup>2</sup>

<sup>1</sup> *Nichols v. Kingdom Iron Ore Co.*, 56 *N. Y.*, 618.

<sup>2</sup> *United States v. Duff*, 6 *Fed. Rep.*, 45; s. c., 19 *Blatch. (C. C.)*, 9 (criminal case).

*Bush v. Miller*, 13 *Barb. (N. Y.)*, 481.

*Melby v. Osborne*, 33 *Minn.*, 492; s. c., 24 *Northwest. Rep.*, 253 (civil cases).

§ 511. *Delivery—mailing*.—For the general rule see:—

*Abb. Tr. Ev.*, 289, 291, 433.

Whether this rule applies to letters sent to public officers, see—

*Affirmative*: *Michigan Land and Iron Co. v. Township of Republic* (*Mich.*, 1887), 9 *Western Rep.*, 123.

*Negative*: *Hammatt v. Emerson*, 27 *Me.*, 308; s. c., 46 *Am. Dec.*, 598 (*dictum*); *Schultz v. Jordan*, 32 *Fed. Rep.*, 55; *Abb. Tr. Ev.*, 196.

Records of the post office, competent between third persons, because kept by a sworn officer. *Merriam v. Mitchell*, 13 *Me.*, 439; s. c., 29 *Am. Dec.*, 514.

That this presumption does not suffice under a statute requiring notice to be given, *Franklin Savings Bk. v. Fatzinger* (*Pa.*, 1886), 2 *Centr. Rep.*, 576, with note.

§ 512. *Letter and enclosures let in each other*.—When a document is properly in evidence, the envelope in which it was delivered, and any other relevant document which accompanied it and was delivered in the envelope, is com-

petent as part of the *res gestæ*, not as proof of statements in it, but to show under what cover its contents reached the party.

United States *v.* Noelke, 17 *Blatchf.* (C. C.), 554; s. c., 9 *Reporter*, 505 (criminal case); Darling *v.* Miller, 54 *Barb.* (N. Y.), 149.

Foster *v.* Newbrough, 66 *Barb.* (N. Y.), 645 (rev'd on another ground in 68 *N. Y.*, 481).

§ 513. *Letters of an agent* through whom business was transacted may be received as part of the *res gestæ*.

Beaver *v.* Taylor, 1 *Wall.* (U. S.), 637.

Rosenstock *v.* Tormey, 32 *Md.*, 169; s. c., 3 *Am. Rep.*, 125.

§ 514. *Mere possession* of letters addressed to one does not render them competent against him.

Willett *v.* People, 27 *Hun* (N. Y.), 469. (Homicide : The court says, "Such letters are the declarations of third parties, and as hearsay, are not evidence of any facts." Aff'd without noticing this point in 92 *N. Y.*, 29.)

[Compare KNOWLEDGE].

After letters received into the possession of the party have been put in evidence against him as received in answer to his letters or advertisements, others of like character, though intercepted, may be received. Queen *v.* Cooper, *L. R.* 1 *Q. B. Div.*, 19.

§ 515. *Omission to answer* a letter is not an admission of the truth of statements contained in it.

Learned *v.* Tillotson, 97 *N. Y.*, 1. But compare RATIFICATION, and ACCOUNT STATED.

But a letter unanswered may be made competent against the recipient, by evidence of his subsequent conversations about it. Dutton *v.* Woodman, 9 *Cush.* (Mass.), 255; s. c., 57 *Am. Dec.*, 46, with note. But not necessarily by his silence when it was spoken of in his presence. Wright *v.* People, 1 *N. Y. Crim.*, 462.

LOST RECORD.—For the mode of proving, see 21 *Abb. N. C.*, 367, note.

MAILS.—[For kindred topics, see LETTERS, NOTICE.]

§ 516. Judicial notice.

§ 517. Deposit.

§ 516. *Judicial notice*.—The court may,<sup>1</sup> but is not bound to,<sup>2</sup> take judicial notice of the time taken by the mails between principal cities.

<sup>1</sup> *Pearce v. Langfit*, 101 *Pa. St.*, 507; s. c., 13 *Pittsb. Leg. J.*, 255; abst. s. c., 27 *Alb. L. J.*, 143.

<sup>2</sup> *Wiggins v. Burkham*, 10 *Wall. (U. S.)*, 129; s. c., 19 *Law. ed.*, 884.

§ 517. *Deposit*.—Dropping in a street letter box, or delivery to the official collecting carrier while he is acting in collection, is mailing.

*Pearce v. Langfit (above cited)*.

MALICE.—[For kindred topics, see INTENT, GOOD FAITH, KNOWLEDGE.]

§ 518. Direct testimony.

§ 519. Insulting manner.

§ 518. *Direct testimony*.—One to whom malice is imputed may testify directly as to whether or not he was actuated by malice.

*Heap v. Parrish*, 104 *Ind.*, 36; s. c., 1 *Western Rep.*, 837 (reversing judgment for exclusion of the question).  
S. P., INTENT, FEELINGS.

§ 519. *Insulting manner* competent as evidence of malice.

*Abb. Tr. Ev.*, 530, 667.

As to made of proving manner, see FEELINGS and INTENT.

MARK.—[See also ACCOUNTS and HANDWRITING.]

§ 520. Genuineness.

§ 521. Intelligence of execution.

§ 520. *Genuineness*.—An ordinary witness may testify directly to the genuineness of a signature by mark.<sup>1</sup> But if it appear by cross-examination or otherwise that his knowledge was not derived from the marksman having made or acknowledged the identical mark in the witness' presence, nor from the witness having frequently seen the mark affixed by the marksman on a number of other documents, his opinion should be excluded or struck out.<sup>2</sup>

Expert evidence is competent as in case of handwriting properly so called.<sup>3</sup>

<sup>1</sup> 2 *Tayl. Ev.*, p. 1585.

<sup>2</sup> On this question the authorities are not agreed; but the true rule doubtless is that testimony to handwriting founded on the principle of uniformity in the characteristics of the habit of a writer is inapplicable to a casual mark made by a person not in the habit of

signing frequently. In other words evidence founded on the assumption of a certain uniformity of habit, should be excluded when it is shown that there was no such habit. For the cases see *Jackson v Vandusen*, 10 *Johns. (N. Y.)*, 144, 155; 2 *Tayl. Ev.*, p. 1584, *n.*; *Laws. Exp. Op. Ev.*, 296.

<sup>3</sup> See HANDWRITING, for these rules.

§ 521. *Intelligence of execution.*—One seeking to enforce the advantages secured by an instrument signed with a mark by an illiterate person, must show that the latter fully understood the object and import of the writing he executed.

*Selden v. Myers*, 20 *How. (U. S.)*, 506; s. c., 15 *Law. ed.*, 976.

Compare KNOWLEDGE, § 499, *n* 1.

MARRIAGE.—[See cases on mode of proving or disproving marriage, or its validity, in 17 *Abb. N. C.*, 494.]

MASTER AND SERVANT.—[For kindred topics, see AGENCY, CHARACTER, and CORROBORATION.]

§ 522. *Presumption of relation.*—Evidence that a person was in charge of property of another, apparently performing usual duties of an employe or servant, raises a presumption in favor of third persons, that he stood in that relation.

*Norris v. Kohler*, 41 *N. Y.*, 42; rev'g 1 *Sweeny (N. Y.)*, 39 (runaway team).

S. P., AGENCY, §§ 102, 103, EMPLOYMENT, § 358.

MEASURE.—[See also QUANTITY, and WEIGHT.]

§ 523. *Measurer.*

524. *Comparison.*

§ 525. *Usage.*

§ 523. *Measurer.*—In the absence of statute, a measurer, though not officially authorized as such, may prove his own measurement;<sup>1</sup> but his certificate is not evidence, except as against a party who assented to that standard or dealt under a usage sanctioning it.<sup>2</sup>

As stipulation calling for measurement by a particular person, does not preclude a party from proving a deficiency by the testimony of any other person.<sup>3</sup>

<sup>1</sup> *Thomas v. Conant (Me., 1886)*, 5 *Atl. Rep.*, 533.

<sup>2</sup> *Bissel v. Campbell*, 54 *N. Y.*, 353.

<sup>3</sup> *Bigler v. Hall*, 54 *N. Y.*, 167 [compare QUANTITY, and WEIGHT.]

§ 524. *Comparison*.—To prove a measurement not exactly known, a witness may be asked how the size of the thing compared with that of another which is known.

*Isbell v. N. Y. & New Haven R. R. Co.*, 25 *Conn.*, 556 (height of fence).  
S. P., QUANTITY.

§ 525. *Usage* of trade as to what quantity is actually called for by language expressive of quantity, is competent.<sup>1</sup>

A general usage of the place being proved,<sup>2</sup> the burden is on a party seeking to evade its effect, to prove his ignorance of it.

<sup>1</sup> *Abb. Tr. Ev.*, 304.

<sup>2</sup> *Johnson v. DePeyster*, 50 *N. Y.*, 666.

*Walls v. Bailey*, 49 *N. Y.*, 464; limited, see *Abb. Tr. Ev.*, 296 n.

## MEMBERSHIP.

§ 526. Record.

527. Office holding.

§ 528. Attendance.

§ 526. *Record*.—Neither the record of a society,<sup>1</sup> nor a statutory registry of members<sup>2</sup> is conclusive.

<sup>1</sup> *Hawkshaw v. Supreme Lodge*, 29 *Fed. Rep.*, 770; s. c., 24 *Centr. L. J.*, 129.

*Lazensky v. Supreme Lodge*, 24 *Blatchf. (C. C.)*, 533; s. c., 31 *Fed. Rep.*, 592.

*Cook v. Chittenden*, 25 *Fed. Rep.*, 544 (stock book).

<sup>2</sup> *Brice, Ultra Vires*, 135, n. 3, 4.

*People v. Peck*, 11 *Wend. (N. Y.)*, 604 (under statute requiring register to be kept of members entitled to vote).

*Herries v. Wesley*, 13 *Hun (N. Y.)*, 492 (list presumptive evidence against stockholders).

§ 527. *Office holding*.—If holding stock or membership is a legal qualification required for holding office, proof of holding office is prima facie evidence of membership or holding stock.

*Butterfield v. Radde*, 38 *N. Y. Super. Ct. (J. & S.)*, 1.

*Herries v. Wesley*, 13 *Hun (N. Y.)*, 492. (This presumption is not sufficient against evidence to the contrary. *Butterfield v. Radde*, 41 *N. Y. Super. Ct. (J. & S.)*, 181; rev'g 38 *Id.*, 1.)

§ 528. *Attendance* at meeting, raises no presumption of membership.

Stevens *v.* Taft, 69 *Mass.* (3 *Gray*), 487.

Kilborn *v.* Rewee, 74 *Mass.* (8 *Gray*), 415.

MERGER.—[For kindred topics, see ELECTION, and INTENT ]

§ 529. Extrinsic evidence.

§ 530. Declarations and acts.

§ 529. *Extrinsic evidence*.—The question whether one contract or title merged in another is no longer regarded as a question of law determinable only on the face of the papers; but extrinsic evidence is freely received, to show intention<sup>1</sup> and to show how the interest of the party is affected, at least before a third person's right has intervened.<sup>2</sup>

<sup>1</sup>Murdock *v.* Gilchrist, 52 *N. Y.*, 242, rev'g 1 *Alb. L. J.*, 124 (executory contract not merged in deed if otherwise agreed).

<sup>2</sup>Smith *v.* Roberts, 91 *N. Y.*, 470 (mortgage not merged in fee).

§ 530. *Declarations and acts*.—Declarations of intent are not alone conclusive; and proof of them does not preclude proof of subsequent acts establishing a contrary intent.

James *v.* Morey, 2 *Cow.* (*N. Y.*), 246; rev'g James *v.* Johnson, 6 *Johns. Ch.* (*N. Y.*), 417.

MESSAGE.—[And see ADMISSIONS, CONVERSATION. TELEGRAM and TELEPHONE. As to effect of oral messages, and errors therein, see *Oakland Ice Co. v. Maxcy*, 74 *Me.*, 294; *Brown v. Leach*, 107 *Mass.*, 364; cases cited in note in 14 *Abb. N. C.*, 397, 398.]

§ 531. Answer competent.

§ 532. — how proved.

§ 531. *Answer competent*.—The answer returned by the messenger is competent as part of the *res gestæ* of the message.

McGoon *v.* Irvin, 1 *Pinn.* (*Wisc.*), 526; s. c., 44 *Am. Dec.*, 409.

§ 532. — *how proved*.—The answer reported by the messenger on returning from making an inquiry may be proved by anyone who heard it.

Robbins *v.* Richardson, 2 *Bosw.* (*N. Y.*), 248.

The bearer of a message calling for an answer is competent to testify to the answer he reported as having been received, notwithstanding the delivery of the message itself may have been a communication which he is incompetent to testify to. *Hill v. Woolsey* (N. Y., 1889), 39 *Alb. L. J.*, 359.

MISNOMER.—[See also, IDENTITY, and NAME.]

§ 533. In contract or deed.

§ 534. In proceedings.

§ 533. *In contract or deed*.—Misnomer may be proved and corrected by oral evidence, in any action, without bringing an action to reform the instrument.

*Cleveland v. Burnham*, 64 *Wisc.*, 347; s. c., 25 *Northwest. Rep.*, 407, 409, and cas. cit.

§ 534. *In proceedings*.—Misnomer in name used in the process and pleading is freely amendable before judgment whenever the fact appears.

*Bk. of Havana v. Magee*, 20 *N. Y.*, 355; 1 *Abb. New Pr. & F.*, 697.

MISTAKE.—[See also ACCIDENTS, ACCOUNTS, KNOWLEDGE INTENT.]

§ 535. Mistake in certified copy.

§ 536. Mistake as an excuse.

§ 535. *Mistake in certified copy*.—A mistake, in a certified copy offered in evidence, may be proved by any witness who has read the original instrument and the record thereof.

*Booth v. Tiernan*, 109 *U. S.*, 205; s. c., 27 *Law. ed.*, 907.

§ 536. *Mistake as an excuse*.—For the purpose of negating the excuse that an act was a mistake, evidence of a course of similar acts is competent as tending to show intent.

*Criminal Trial Brief*, 361, § 603.

MOON.

§ 537. *An almanac* may be used to ascertain the time at which the moon rose or set on a specified date.

The controversy is as to whether it is evidence, as held in *Munshower v. State*, 55 *Md.*, 1; s. c., 2 *Crim. L. Mag.*, 320; or only the means of refreshing the knowledge of the court or jury, as held in *Case v. Perew*, 46 *Hun* (N. Y.), 57; S. P., SUNRISE.

MOTIVE AND PURPOSE.—[For kindred topics, see BELIEF, GOOD FAITH, EXPLANATION, CORROBORATION, INDUCEMENT, INTENT, MALICE, FEELINGS and KNOWLEDGE. As to criminal cases, see *Criminal Brief*, 407, § 673; 302, § 519; 370, § 619, etc.]

§ 538. Direct testimony.  
539. Declarations.

§ 540. Motive as affecting cause of action.

541. Motive in suing.

§ 538. *Direct testimony*.—When the motive of an act is relevant, a person may testify to the motive or inducement which led him to do it.<sup>1</sup>

One who participated in a transaction may testify directly to the purpose of any ambiguous act.<sup>2</sup>

<sup>1</sup> *Richmondville Union Sem. v. McDonald*, 34 N. Y., 379 (holding that in an action by a corporation upon a subscription paper, an officer of the corporation, examined as a witness and having knowledge upon the matter, may state that debts were contracted by the corporation on the faith of the subscription. This is rather a matter of fact than opinion).

*Hess v. Blakeslee*, 2 N. Y. *State Rep.*, 309 (creditor may testify that debtor's representations induced him to delay proceeding).

*Barrett v. Western*, 66 Barb. (N. Y.), 205. (Plaintiff suing for deceit may testify that he relied on defendant's representations.) S. P., INDUCEMENT.

S. P., *Ross v. Terry*, 63 N. Y., 613 (reliance on personal responsibility, competent as negating presumption that there was no implied warranty).

[*Contra*: *Cullmans v. Lindsay* (Pa., 1886), 4 *Central Rep.*, 747 (holding that testimony to unexpressed motive is not competent; but the question is for the jury).]

Thus it having been shown that a life policy was issued on the representations of the insured, the agent or officer of the company to whom they were made may testify whether the representations had any and what effect upon his mind, and in inducing his recommendation of the risk; and whether, but for the representations, he would have recommended its acceptance. *Valton v. Nat. Loan Fund Life Assurance Soc.*, 4 Abb. Ct. App. Dec. (N. Y.), 437; rev'g 17 Abb. Pr., 268. [But *Contra*, see § 472, INDUCEMENT.]

But if the applicant made no representations, evidence as to what effect facts respecting the habits of the insured would have on the minds of the insurers, is incompetent. *Rawls v. Am. Mut. Life Ins. Co.*, 27 N. Y., 282, 291; aff'g 36 Barb. (N. Y.), 357; *Joyce v. Maine Ins. Co.*, 45 Me., 168; S. P., *Milwaukee & St. P. Ry. Co. v. Kellogg*, 94 U. S., 469, 473.



[For authorities in criminal cases, see *Criminal Brief*, 376, § 622.]

Testimony of a witness (in the interest of his employers), as to his motive in doing an act, is not conclusive. *Courtney v. Baker*, 60 *N. Y.*, 1; dismissing appeal from and overruling, 37 *N. Y. Super. Ct. (J. & S.)*, 249.

<sup>2</sup> *Osborn v. Robbins*, 36 *N. Y.*, 365; s. c., 4 *Abb. Pr.*, *N. S. (N. Y.)*, 15; rev'g 37 *Barb. (N. Y.)*, 481 (question of duress).

*Bank v. Kennedy*, 17 *Wall. (U. S.)*, 19 (purpose of payment).

§ 539. *Declarations*, as part of *res gestæ*, *Abb. Tr. Ev.*, 587, 589, 636, 648.

§ 540. *Motive as affecting cause of action*.—If the doing of an act be legal, the motive is irrelevant to the question whether the act constituted a cause of action, against the person doing it.<sup>1</sup> But if the doing of an act be illegal, evil motive may be relevant to enhance damages.

<sup>1</sup> *Oglesby v. Attrill*, 105 *U. S.*, 605, 650 (motive of corporate officers in issuing stock).

*Moran v. McClearns*, 60 *Barb. (N. Y.)*, 388; s. c., 4 *Lans. (N. Y.)*, 288.

*Simpson v. Dall*, 3 *Wall. (U. S.)*, 460, 476 (motive in payment).

*Adler v. Fenton*, 24 *How. (U. S.)*, 407 (transfer to evade creditors).

[Malicious prosecution is an apparent exception.]

But the appearance of a bad motive for suing may be ground for requiring a very clear case. *Re Bennett*, 12 *Nat. Bank. Reg.*, 183.

The court has inherent power to guard against abuse of its own process. See 10 *Abb. N. C.*, 361.

Motive in buying a cause of action may be relevant in the assignee's suit in equity. See *Wait on Insolv. Corp.*, 573, and cas. cited, compare 72 *N. Y.*, 575.

§ 541. *Motive in suing*.—If there is a good cause of action, evil motive in suing on it is irrelevant.

*Morris v. Tuthill*, 72 *N. Y.*, 575.

*Wait on Insolv. Corp.*, 440.

[But extreme remedies peculiar to equity are often refused because so invoked.]

NAME AND DESIGNATION.—[And see IDENTITY and MISNOMER.]

§ 542. Hearsay.

543. Forgotten name.

544. Interrogating to names of witnesses.

§ 545. Omitting from testimony or document.

546. Trade designation.

§ 542. *Hearsay* not necessarily incompetent.

Berniaud *v.* Beecher, 71 *Cal.*, 38; s. c., 11 *Pacif. Rep.*, 802. (*Dictum*, that witness may testify to what given name is represented by the initial in a person's name, although his knowledge was acquired by hearsay.)

§ 543. *Forgotten name*.—If a witness cannot recollect a name, a list of names may be read to him to ask him which it is.

Acerro *v.* Petroni, 1 *Stark.*, 100. [And see FORGOTTEN FACT].

§ 544. *Interrogating to discover names of witnesses*.—Witness may be protected in refusal to disclose name of person from whom he obtained information, if the name or identity is not relevant to the issue.

State *v.* Soper, 16 *Me.* 293; s. c., 33 *Am. Dec.*, 665. (*Held*, no error to exclude an inquiry of a witness as to the names of the persons from whom he obtained information which led to the arrest of the accused; for a witness in a criminal trial is not bound to do so.)

S. P., *Civil Jury Brief*, 94.

§ 545. *Omitting from testimony or document*.—A name of a third person is not to be omitted from testimony or a document otherwise competent, merely because of the incriminating or scandalous connection;<sup>1</sup> but it may be omitted by consent.<sup>2</sup>

<sup>1</sup> Rex *v.* Walkley, 6 *Carr & P.*, 175.  
*Criminal Trial Brief*, 316, § 549.

<sup>2</sup> If counsel agree to withhold the name, it may be written on a paper, identified by the witness, and shown to the judge, without being announced or going into the record.

§ 546. *Trade designation*.—An expert may be asked by what name or designation an article or structure is generally known or spoken of in the trade.

Mead *v.* Northwestern Ins. Co., 7 *N. Y.*, 530 (builder may be asked whether he would call buildings filled in, brick buildings).

Downs *v.* Sprague, 1 *Abb. Ct. App. Dec. (N. Y.)*, 550; s. c., 2 *Keyes (N. Y.)*, 57. (Action on contract to supply gas fixtures: gas-fitter competent to say whether gas meters are usually classified as gas fixtures.)

*Pollen v. Leroy*, 10 *Bosw. (N. Y.)*, 38; *aff'd* in 20 *N. Y.*, 549 (brand of lead).

*Compare Schmieder v. Barnay*, 113 *U. S.*, 645; *s. c.*, 28 *Law. ed.*, 1130 (holding that an expert cannot be asked whether, in his opinion, Saxony dress goods were known in trade among merchants as goods of similar description to delaines, for this is a matter of common knowledge; but he might be asked if "of similar description" is a commercial term; and if so what is its meaning).

*Compare Morton v. Fairbanks*, 28 *Mass. (11 Pick.)*, 368 (holding that whether what defendant offered in performance of a contract for shingles were such was for the jury; and that the court could not on inspection rule that they were only chips).

## NATIONALITY.

§ 547. Of person.

§ 548. Of vessel.

§ 547. *Of person.*—How proved.

*Abb. Tr. Ev.*, 102. [And see NATURALIZATION.]

§ 548. *Of vessel*, when incidentally involved, may be shown by any evidence; and the documentary evidence is not essential.<sup>1</sup>

A vessel at sea will not be presumed to have belonged to a nation whose law is different from ours.<sup>2</sup>

<sup>1</sup> *United States v. Pirates*, 5 *Wheat. (U. S.)*, 184; *s. c.*, 5 *Law ed.*, 64 (piracy).

<sup>2</sup> *Hynes v. McDermott*, 82 *N. Y.*, 41; *s. c.*, 37 *Am. Rep.*, 538; *aff'g* 7 *Abb. N. C.*, 98.

See also *United States v. Holmes*, 5 *Wheat. (U. S.)*, 412; *s. c.*, 5 *Law. ed.*, 122; *Murray v. United States*, 17 *Wall. (U. S.)*, 582; *s. c.*, 21 *Law. ed.*, 682; *Reusse v. Meyers*, 3 *Campb.*, 475; and *Wynkoop's Documenting of Vessels*.

## NATURALIZATION.—[And see NATIONALITY.]

§ 549. Presumption.

550. Best and secondary.

§ 551. Certified copy.

552. Record conclusive.

§ 549. *Presumption.*—Evidence of having voted may raise a legal presumption of having been naturalized.

*People ex rel. Smith v. Pease*, 27 *N. Y.*, 45; *s. c.*, 25 *How. Pr. (N. Y.)*, 495; *aff'g* 30 *Barb. (N. Y.)*, 588 (so held on question of legality of vote, in trying title to office).

§ 550. *Best and secondary*.—Naturalization cannot be proved by parol,<sup>1</sup> unless a foundation for secondary evidence is first laid; and then it may be.<sup>2</sup>

<sup>1</sup> Charles Green's Sons v. Salas, 31 *Fed. Rep.*, 106.

<sup>2</sup> Hogan v. Kurtz, 94 *U. S.*, 773; s. c., 24 *Law. ed.*, 317.

§ 551. *A certified copy* of a record of naturalization in another State, certified according to the Act of Congress<sup>1</sup> admissible, without further proof that it has been in the custody of the clerk, etc., and without extraneous proof of any of the preliminaries of naturalization.<sup>2</sup>

<sup>1</sup> Charles Green's Sons v. Salas, 31 *Fed. Rep.*, 106.

United States v. Walsh, 22 *Fed. Rep.*, 644 (indictment for perjury: clerk cannot contradict fact involved in record).

McCarthy v. Marsh, 5 *N. Y.*, 263; overruling Banks v. Walker, 3 *Barb. Ch. (N. Y.)*, 438.

<sup>2</sup> McCarthy v. Marsh (*above cited*).

§ 552. *Record conclusive*.—The record if produced or proved by certified copy cannot be contradicted collaterally,<sup>1</sup> even by producing a declaration made in the same court by the same alien, which is insufficient to sustain the judgment.<sup>2</sup>

But a mistake in the copy can be shown, see MISTAKE.

<sup>1</sup> For the form see 2 *Abb. New Pr.*, 728, and for the authorities more fully *Abb. Tr. Ev.*, 541.

<sup>2</sup> People v. Snyder, 41 *N. Y.*, 397; aff'g 51 *Barb. (N. Y.)*, 589.

Compare St. Paul etc. Minneap. R. R. Co. v. Burton, 111 *U. S.*, 788.

## NAVIGABILITY.

§ 553. *Judicial notice* is taken.

People v. Gold Run Ditch and Mining Co., 66 *Cal.*, 138, 144; s. c., 4 *Pacific Rep.*, 1152.

Neaderhouser v. State, 28 *Ind.*, 257, 267. (*Dictum* as to large rivers and point above which navigability ceases.)

Tewksbury v. Schulenberg, 41 *Wisc.*, 584, 593 (small streams; and usage of improving log driving by dams).

NECESSARIES, AND NECESSITY.—[For kindred topics, see CARE, CAUSE, CONDITION, and EFFECT.]

§ 554. *Opinion*.—The opinion of a witness that specified

articles are necessities in ordinary life, within the meaning of a rule of law, is not competent.<sup>1</sup>

Otherwise as to what is necessary under a contract.<sup>2</sup>

On a question for expert testimony,—such as whether a jettison was necessary in a particular storm,—the opinion of an expert is competent.<sup>3</sup>

<sup>1</sup> *Whitmarsh v. Angle*, 3 *Code Rep.*, 53; s. c., *Am. Law R.*, N. S., 595 (exemption from execution).

*Pock v. Miller*, 1 *Hill. (N. Y.)*, 108 (clothing for infant. *Held*, that testimony that the articles “were necessary,” was not sufficient evidence that they were “necessaries,” within the rule. The circumstances should be shown).

*Tolles v. Wood*, 16 *Abb. N. C.*, 1; s. c., less fully 99 *N. Y.*, 616 (necessary support for beneficiary, which creditors cannot touch).

<sup>2</sup> *Merritt v. Seaman*, 6 *N. Y.*, 168. (Promise to pay for whatever might be needed for the support; opinion competent that certain allowances made to the party were proper.)

*France v. McElhone*, 1 *Lans. (N. Y.)*, 7. (Agent being authorized to make necessary deductions in settling claims, his opinion as to the necessity is admissible in his favor.)

Oral evidence of the acts and declarations of the parties, showing what they considered to be necessary, is admissible. *Almgren v. Dutilh*, 5 *N. Y.*, 28.

<sup>3</sup> *Price v. Hartshorn*, 44 *N. Y.*, 94; aff'g 44 *Barb. (N. Y.)*, 645.

[*Compare Amstein v. Gardner*, 134 *Mass.*, 4; cattle-guard: opinion held incompetent.]

NEGATIVE.—[For kindred topics, see CONTRADICTION, CORROBORATION, EXPLANATION and POSSIBILITY.]

§ 555. Presumption of innocence.

§ 558. Official act.

556. Lack of entry in account.

559. Non-observation of witness.

557. — in public record.

§ 555. *The presumption of innocence* when in favor of the affirmative of the issue as against an imputation of fraud or crime is a sufficient support to the affirmative, to throw on the other party the burden of proving the negative, even though the fact be peculiarly within the knowledge of the party having the affirmative.

*Colorado Coal & Iron Co. v. United States*, 123 *U. S.*, 307 (reviewing cases)

*Maxwell Land Grant Case*, 121 *U. S.*, 325, followed in *United States v. Iron Silver Mining Co.*, 128 *U. S.*, 673.

For the general rule as to burden of proof of negative, see *Civil Jury Brief*, 84, 85; *Abb. Tr. Ev.*, 771, n. 13.

§ 556. *Lack of entry in account.*—To prove that a person never had any dealings with another, the accounts or records of the dealings of the latter are admissible;<sup>1</sup> and so is the testimony of a witness who has examined them,<sup>2</sup> and such witness may be allowed to testify to the result in the negative, without producing the accounts themselves.<sup>3</sup>

<sup>1</sup> *Contra*: *Mallocks v. Lyman*, 18 *Vt.*, 98; s. c., 46 *Am. Dec.*, 138. But the objection goes to the weight, not the competency of the evidence, unless the accounts are those of the party offering them. Even then they may be made competent by testimony that all the party's dealings were recorded.

<sup>2</sup> *Burton v. Driggs*, 20 *Wall. (U. S.)*, 125; s. c., 22 *Law. ed.*, 299; 3 *Id.*, and see ABSTRACTS.

§ 557. — *in public record.*—To prove the fact that an instrument or entry does not appear in a public record, testimony of any person who has examined the record is competent.<sup>1</sup>

The certificate of the officer having custody of the record is competent when made so by statute<sup>2</sup>; but the existence of such a statute does not preclude proving the fact by the testimony of any person.<sup>3</sup>

<sup>1</sup> *Jackson v. Russell*, 4 *Wend. (N. Y.)*, 543.

<sup>2</sup> As by *N. Y. Code Civ. Pro.*, § 921, revising 2 *R. S.*, 552, § 12.

<sup>3</sup> *Teall v. Van Wyck*, 10 *Barb. (N. Y.)*, 376.

*People v. Parker*, (*Mich.*, 1887), 11 *Western Rep.*, 182; s. c., 34 *Northwest. Rep.*, 720.

Testimony of a witness that he had visited the recording office and examined the book of protocol or powers of attorney for specified years, and that between specified dates there was no such instrument, and there was no visible evidence of mutilation, the witness producing photographic copies of the pages, *held*, not sufficient, where the deed was an ancient one corroborated by possession, etc. *McPhaul v. Lapsley*, 20 *Wall. (U. S.)*, 264; s. c., 22 *Law. ed.*, 344.

SWAYNE, J., said (p. 287): It should at least have been shown by some one officially connected with the office, that the book seen by the witness was the book and the only book there wherein the instrument could have

been properly recorded, and that there was no such protocol *anywhere* in that book, or elsewhere in the office. It was also possible it was known in the office that the missing signature had been removed by some dishonest hand.

§ 558. *Official act*.—To disprove an alleged official act, or the genuineness of an apparent official document, the officer may testify that his custom was not to do the act in question except under given circumstances, evidence being also given that such circumstances did not exist in this case.

Morrow v. Ostrander, 13 Hun (N. Y.), 219.

§ 559. *Non-observation of witness*.—Upon the question whether an alleged fact occurred a witness who had adequate opportunities of observation may testify that he did not observe it, as tending to disprove its occurrence, although he cannot swear positively that it never took place, and although it does not appear that he was watching for it.<sup>1</sup>

To show his opportunity of observation, he may testify that he would have heard or seen it if it had occurred, if he can state this as a fact and not as a conclusion or opinion.<sup>2</sup>

<sup>1</sup> Greany v. Long Island R. R. Co., 101 N. Y., 419 (passenger on train, not hearing signal).

S. P., Maxwell v. Harrison, 8 Ga., 61; s. c., 52 Am. Dec., 385 (witness never heard any adverse claim of title).

Fredenburgh v. Biddlecom, 85 N. Y., 196, 202 (never heard him make such a claim).

So on the question of the practical location of a boundary line, it is competent to ask a witness whose residence and relation to the parties is such, that had there been a difference between the adjoining proprietors in respect to the line, he would have been likely to know it, whether he ever heard of more than one line; and his answer, that he had not, is some evidence of acquiescence in that line. Ratcliffe v. Cary, 4 Abb. Ct. App. Dec. (N. Y.), 4; s. c., as Radcliffe v. Gray, 3 Keyes, (N. Y.), 510.

Compare Chicago & A. R. R. Co. v. Johnson (Ill., 1886), 4 Northeast. Rep., 381. (Not error, on question of seriousness of injury, to refuse to allow neighbors and friends to testify that they never heard of plaintiff's being seriously injured).

<sup>2</sup> Casey v. N. Y. Central etc. R. R. Co., 6 Abb. N. C., 104, 124, with note; s. c., 8 Daly (N. Y.), 220; aff'd in 78 N. Y., 518.

Hollender v. N. Y. Central etc. R. R. Co., 19 *Abb. N. C.*, 18.

Chicago etc. R. R. Co. v. Dillon, 123 *Ill.*, 570; s. c., 13 *Western Rep.*, 286; 15 *Northeast. Rep.*, 181 (bell at crossing).

Burnham v. Sherwood (*Me.*, 1888), 6 *New Engl. Rep.*, 627; s. c., 14 *Atlantic Rep.*, 715 (requiring, however, that the witness state all the details).

## NEW PROMISE.

§ 560. How proved.

§ 561. Presumption of knowledge.

§ 560. *How proved.* *Abb. Tr. Ev.*, 821, 823.

§ 561. *Presumption of knowledge.*—There is a legal but not conclusive presumption that a person who made a new promise, knew the facts necessary to establish his exemption from liability, before making it.

Taft v. Sergeant, 18 *Barb. (N. Y.)*, 320.

Compare ACQUIESCENCE.

## NEWSPAPERS.—[And see PRINTING and PUBLICATION.]

§ 562. Not evidence.

§ 563. Judicial notice.

§ 562. *Not evidence.*—A newspaper statement is not evidence without independent authentication.

Downs v. N. Y. Central R. R. Co., 47 *N. Y.*, 83. (Newspaper account of accident inadmissible, without proof that it was an original memorandum, or that it embodied statements made by the parties at the time.)  
Child v. Sun Mut. Ins. Co., 3 *Sandf. (N. Y.)*, 26. (Foreign newspaper inadmissible to prove deviation, unseaworthiness, etc.)

Fosgate v. Herkimer Manuf. Co., 9 *Barb. (N. Y.)*, 287; see further decision, in 12 *Id.*, 352 (death notice: compare, as to facts of pedigree, *Abb. Tr. Ev.*, 90–100).

§ 563. *Judicial notice* not taken of the meaning of the usual printer's abbreviations of dates for insertion, at the foot of advertisements.

Johnson v. Robertson, 31 *Md.*, 476, 489.

NOTICE.—[As to proving the actual mental state of knowledge or suspicion, see BELIEF, KNOWLEDGE, INTENT, and GOOD FAITH. As to communication of information, see also CONVERSATION, LETTERS, MAILS, MESSAGE, TELEGRAMS, and TELEPHONE.]

§ 564. Anonymous letter: stranger. § 566. Notice to agent.

564a. Possession.

567. —not received in principal's business.

565. Notice to charge with fraud.



- § 568. — agent with conflicting duties. § 571. Authentication.  
 569. — sub-agent. 572. Record and index.  
 570. Notice to director, etc. 572a. *Lis pendens*.

§ 564. *Anonymous letter : stranger*.—An anonymous letter not sufficient to charge with notice.<sup>1</sup>

Otherwise of information from a stranger.<sup>2</sup>

<sup>1</sup> *Fillo v. Jones*, 2 *Abb. Ct. App. Dec.* (N. Y.), 131 (notice to charge city with negligence).

<sup>2</sup> *Hadencamp v. Second Ave. R. R. Co.*, 1 *Sweeny* (N. Y.), 490. (Defect in R. R. vehicle).

§ 564a. *Possession, as notice*.

See the history and illustrations of the rule in 19 *Abb. N. C.*, 296, note; *Abb. Tr. Ev.*, 717; *Hodge's Ex'rs. v. Amerman*, 40 *N. J. Eq.*, 99; s. c., 2 *Atlantic Rep.*, 257; 2 *Central Rep.*, 741; *Pope v. Allen*, 90 *N. Y.*, 298 (open and notorious character of possession); *Farmers' & Merchants' National Bank v. Wallace*, 45 *Ohio St.*, 152; s. c., 12 *Northeast. Rep.*, 439 (possession by husband and wife); *Brinser v. Anderson* (*Pa.*, 1888), 10 *Central Rep.*, 776, 779 (possession under lease).

§ 565. *Notice to charge with fraud*.—It is now settled that the rule that facts sufficient to put a party on inquiry, coupled with failure to exercise due diligence in making inquiry, charges the party with notice as matter of law, only applies for the protection of some actual outstanding title, lien, equitable interest, or trust constituting a special equity. It does not apply in the case of one claiming under a fraudulent conveyance who is in fact innocent of any guilty knowledge or actual suspicion.

*Parker v. Conner*, 93 *N. Y.*, 119, and *cas. cit.*

§ 566. *Notice to agent*.—The rule that a principal is chargeable with knowledge of facts communicated to or acquired by his agent in the course of the transactions in which the agent represented the principal, unless the communication of such fact to the principal by the agent would involve a positive breach of duty,<sup>1</sup> applies in the case of a continuous agency involving a long series of transactions of the same general character, to knowledge acquired by the agent in any of such transactions so as to affect the principal in any later transaction in which the agent as such is engaged and in which the knowledge is material.<sup>2</sup>

<sup>1</sup> This rule is sustained by the great current of authority, both in America and England.

See articles (and cases collected) in 13 *Weekly Law. Bul.*, 182; 36 *Am. Dec.*, 188, 200.

*Wade on Notice*, 2d ed., § 687.

*Slattery v. Schwannecke*, 44 *Hun* (N. Y.), 83, and cas. cit.

*United States v. 278 Barrels*, 11 *Wall.* (U. S.), 356.

The circumstance that the solicitor had an interest not to disclose such fact is immaterial. *Bradley v. Riches*, *L. R.* 9 *Ch. Div.*, 189.

*S. P., Innerarity v. Merchants' Nat. Bank*, 139 *Mass.*, 332; s. c., 1 *Northeast. Rep.*, 282, 285.

<sup>2</sup> *Holden v. N. Y. & Erie Bank*, 72 *N. Y.*, 286.

For the application of the principle to the relation of *Attorney and Client*, see *Saffron-Walden Building Soc. v. Rayner*, *L. R.* 14 *Ch. Div.*, 406; s. c., 43 *L. T. R.* (N. S.), 3 (holding that successive retainers are not a continuous employment within the rule); *Hulbert v. Douglass*, 94 *N. C.*, 122, and *Carter v. Ottawa*, 24 *Fed. Rep.*, 546 (knowledge of attorney who acted both for buyer and seller of security); *McCormick v. Joseph* (*Ala.*, 1888), 3 *Southern Rep.*, 796.

§ 567. — *not received in principal's business.*—A principal is not chargeable with knowledge of facts communicated to his agent where the notice was not received or the knowledge obtained in the very transaction in question, except upon clear proof that the knowledge otherwise obtained was present to his mind at the very time of the transaction in question.

*Constant v. University of Rochester*, 111 *N. Y.*, 604; s. c., 19 *Northeast. Rep.*, 631 (so holding where the transactions were for different principals, and eleven months had elapsed).

Notice to the principal, actual or constructive, is not qualified by the same rule. *Cox v. Andrews* (N. Y., 1889), abst. s. c., 39 *Alb. L. J.*, 360.

*Compare Riley v. Hoyt*, 29 *Hun* (N. Y.), 114 (holding good faith not disproved by forgotten conversation).

§ 568. — *agent with conflicting duties.*—Where an agent owes conflicting duties to two principals who have not knowledge of the double relation, notice to him, received in his transactions for one, is not notice to the other.

*Constant v. University of Rochester*, 111 *N. Y.*, 604; s. c., 19 *Northeast. Rep.*, 631 (*dictum*).

§ 569. — *sub agent*.—Notice to a sub agent employed by an intermediate independent employe is not sufficient to charge the principal with notice.

Hoover v. Wise, 91 U. S., 308 (aff'g 61 N. Y., 305, and 62 Barb. (N. Y.), 188); explained in Exchange Nat. Bk. v. Third Nat. Bk., 112 U. S., 276.

§ 570. *Notice to director or officer of corporation*.—Even where notice to a director or other officer is not equivalent to notice to the corporation by reason of relating to a matter not under his charge, it is competent as a fact from which notice to the corporation may be found; because the jury may presume that he did his duty by communicating to the corporation the knowledge he had obtained and which it was material that the corporation should know.<sup>1</sup> Otherwise where he was acting as a wrongdoer.<sup>2</sup>

<sup>1</sup> Winnie v. Ulster County Sav'gs Inst., 37 Hun (N. Y.), 349, 351.

<sup>2</sup> Innerarity v. Merchants' Nat. Bank, 139 Mass., 332; s. c., 1 Northeast. Rep., 282, 285.

§ 571. *Authentication*.—Where the effect of an express notice depends upon its manifesting an intent or election on the part of the person from whom it proceeds, it must, if in writing, be signed and addressed sufficiently to show that fact.

1 Abb. New Pr. & F., 223, 225, and cases cited.

Payn v. Mut. Relief Soc., 17 Abb. N. C., 53, 56. (Holding that a card circular with printed signature of the general secretary, but filled out, addressed and sent by a local secretary, was not sufficient notice from the general secretary to sustain a forfeiture.)

§ 572. *Record and index*.—Under the recording acts, record is notice from the time of the delivery of the instrument to the recording officer; and the fact that it is omitted or misstated in the index does not impair the effect of the notice<sup>1</sup> unless the statute so provides.

But after actual record, it is notice only of the instrument as it appears upon the record; and an error therein will in so far impair the effect of the notice.<sup>2</sup>

<sup>1</sup> Mutual Life Ins. Co. v. Dake, 87 N. Y., 257 (record of mortgage); Hamilton v. Whitney, 19 Neb., 303; s. c., 27 Northwest. Rep., 125 (record of judgment).

<sup>2</sup> *Devlin on Deeds*, § 649, and *cas. cit.*

Compare, *Manhattan Co. v. Laimbeer*, 21 *Abb. N. C.*, 27 (rev'g 17 *Id.*, 128, and holding that the county clerk's omission to record a partnership certificate left with him, does not, under the statute, impair its effect as notice).

§ 572a. *Lis pendens*.—For the history and limits of the rule and the effect of the *lis pendens* statutes—

See 2 *Abb. New Pr. & F.*, 12, and cases cited

## OATH.

§ 573. *Taking, how proved*: in affidavit, see cases collected in 1 *Abb. New Pr. & F.*, 20, 45: in open court, or before officer, *Id.*, 230–232.

OFFICIAL CHARACTER AND ACTS.—[See also *Abb. Tr. Ev.*, 193.]

§ 574. Judicial notice.

575. Performance of duty

§ 576. Meeting.

577. Reports of subordinates.

§ 574. *Judicial notice*.—The court may take judicial notice of regulations prescribed by a department of the executive, for the conduct of members of the community at large in matters affecting the state.

*United States v. Williams*, 6 *Mont.*, 379; s. c., 12 *Pacific Rep.*, 851 (regulations of the Interior Department as to cutting timber on public lands).

*People ex rel. Garling v. Van Allen*, 55 *N. Y.*, 31 (general regulations for the military forces of the state).

*Burke v. Miltenberger*, 19 *Wall. (U. S.)*, 519; s. c., 22 *Law. ed.*, 158. (But the court will not take notice of the various orders issued by a military commander. *Id.*)

§ 575. *Performance of duty*.—The presumption that a public officer did his duty is enough, between third persons, to cast the burden on him who impeaches the act.<sup>1</sup> But it is only available in aid of evidence of the substantive fact; and cannot supply the want of such evidence.<sup>2</sup> An officer is not presumed in his own favor to have done his duty correctly.<sup>3</sup>

<sup>1</sup> *Ensign v. McKinney*, 12 *Abb. N. C.*, 463; s. c., 30 *Hun (N. Y.)*, 249.

<sup>2</sup> *Hilton v. Bender*, 69 *N. Y.*, 75, rev'g 2 *Hun (N. Y.)*, 1; s. c., 4 *Supm. Ct. (T. & C.)*, 270.

*United States v. Ross*, 92 *U. S.*, 281.

<sup>3</sup> O'Brien v. McCann, 58 N. Y., 373.

<sup>1</sup> § 576. *Meeting.*—A meeting of a board of officers appearing by its record is presumed, in the absence of evidence to the contrary, to have been regularly called.<sup>1</sup>

It may be otherwise in the absence of evidence of jurisdiction, where the object is to justify what would otherwise be a trespass.<sup>2</sup>

<sup>1</sup> Astor v. Mayor etc. of N. Y., 62 N. Y., 567.

Torr v. State, 115 Ind., 188; s. c., 15 Western Rep., 116; 17 Northeast. Rep., 286.

<sup>2</sup> Miller v. Brown, 56 N. Y., 383.

§ 577. *Reports of subordinates.*—As against a public officer or corporation, a report made by a subordinate officer or other person appointed by him or them to examine and report upon a question of fact, is competent evidence.

Trial of Dorn, 485, 494. (Impeachment: report of a person appointed by defendant to examine into the condition of the canals and report to the canal board, admissible in evidence against defendant in proof of his knowledge of condition.)

Vicksburg etc. R. R. Co. v. Putnam Bk., 30 Law. ed. (U. S.), 257. (Reports of superintendent to board of directors, competent as to the condition of the road.)

St. Louis Gas Light Co. v. St. Louis, 86 Mo., 495; s. c., 1 Western Rep., 417. (Record of the civil engineer, and register by the gas inspector, competent in action against city for price of gas, etc.)

OPINIONS.—[For the various facts which may be proved by opinion see the titles of the fact in question, as AGE, CARE, HEALTH, etc. For application of rules in criminal case, see *Criminal Brief*, 335, 337, § 582, etc.]

§ 578. Distinction between opinion, § 586. Assuming fact without evidence and observation with judgment.

579. Questions preliminary to opinion. 587. Preponderance of evidence not necessary.

580. Qualification of expert. 588. Written question.

581. Party as expert. 589. Critical opinion of other testimony incompetent.

582. On what questions competent. 590. Reason.

583. Direct testimony on the fact. 591. Doubt.

584. Basis of facts for opinion. 592. Cross-examination.

585. Doubtful facts may be assumed. 593. Impugning expert's examination.

§ 578. *Distinction between opinion, and observation with judgment.*—A fact of observation depending on minutiae

such as cannot be described to the jury with the same effect as they justly produce in the mind of an intelligent observer, may be proved by the testimony of the witness directly to the conclusion formed from such minutiae, provided that conclusion is not mere matter of opinion deduced from facts observed, but is itself a fact discerned by the witness in the act of observation, though it may be in part by the exercise of judgment.<sup>1</sup>

This rule allows a witness to state the result of a comparison, without being confined to describing his observation of each thing compared.<sup>2</sup>

<sup>1</sup> For numerous illustrations see ABILITY, FEELING, HEALTH, etc.

<sup>2</sup> *Collins v. N. Y. Central etc. R. R. Co.*, 109 N. Y., 243, reversing judgment in 23 N. Y. *Weekly Dig.*, 154, because engineer was not allowed to answer whether one engine discharged more sparks than the other, but was required to state what he observed.

§ 579. *Question preliminary to opinion.*—Whether one is offered as an expert, is qualified as such, is a preliminary question to be determined by the court before he gives his testimony.<sup>1</sup> And on this question the objector has a right to interpose with preliminary cross-examination upon the facts material to competency.<sup>2</sup>

<sup>1</sup> *Nelson v. Sun Mut. Ins. Co.*, 71 N. Y., 453; aff'g 40 N. Y. *Super. Ct. (J. & S.)*, 417.

<sup>2</sup> *Civil Jury Brief*, 55 (14), citing cases.

*Contra*: *Fort Wayne v. Coombs*, 107 Ind., 75; s. c., 5 *Western Rep.*, 229 (unsound; for though the appellate court may regard the question of qualification discretionary, the objector has a right to have the facts put upon the record by cross-examination, in order that the appellate court may see that there has been no abuse of that discretion).

§ 580. *Qualification of expert.*—Either professional study, or actual experience, is enough to qualify; both are not necessary.

*Hand v. Church*, 39 *Hun (N. Y.)*, 303. (One having had much experience in paying for legal services, competent to testify to value.)

*Fort Wayne v. Coombs*, 107 Ind., 75; s. c., 5 *Western Rep.*, 235 (study without practical experience sufficient).

The opinion of a witness formerly practising a particular trade, is not rendered incompetent upon a question relating to such art or trade, by the fact that he has abandoned its practice and engaged in other business. *Bearss v. Copley*, 10 *N. Y.*, 93; *S. P.*, *Robertson v. Knapp*, 35 *N. Y.*, 91; *s. c.*, 33 *How. Pr. (N. Y.)*, 309.

§ 581. *A party to the action may, as an expert, testify to his own opinion.*

*Dickenson v. Fitchburg*, 79 *Mass.* (13 *Gray*), 546.

§ 582. *On what questions competent.*—Superior knowledge or skill on the part of a witness does not make a case for expert opinion; but the question itself must be one relating to some trade, profession, science, or art in which persons instructed therein, by study or experience, may be supposed to have more skill and knowledge than jurors of average intelligence may be presumed generally to have.

*Ferguson v. Hubbell*, 97 *N. Y.*, 507, and *cas. cit.*

§ 583. *Direct testimony on the fact.*—When the knowledge of the expert as to the particular fact in question is derived from his own observations, whether made in or out of court, he may be asked his opinion directly upon the fact.<sup>1</sup>

When his knowledge is derived from hearing the testimony of witnesses he cannot be asked his opinion directly on the fact, but an hypothetical question must be put.<sup>2</sup>

But it is not error to allow a direct question founded on what the expert has heard a previous witness state, if such statements are unquestioned and the jury understand that the opinion of the expert is given on the assumption of their truth.<sup>3</sup>

<sup>1</sup> *State v. Leabo*, 89 *Mo.*, 247; *s. c.*, 5 *Western Rep.*, 401.

<sup>2</sup> *Reynolds v. Robinson*, 64 *N. Y.*, 589.

To call for the opinion of a witness it is not competent, if the evidence is conflicting, to ask him whether, he having heard the evidence, and supposing it to be true, is or is not of a specified opinion; but he should be asked if specified facts, assumed by the question to be established, are found by the jury to be true, what would on such facts, be his opinion on the question. *Woodbury v. Obear*, 7 *Gray (Mass.)*, 467, 471, approved in *Comm. v. Mullins*, 2 *Allen (Mass.)*, 295.

<sup>3</sup> *Seymour v. Fellows*, 77 N. Y., 178; aff'g 44 N. Y. *Super. Ct. (J. & S.)*, 124.

*S. P., Yardley v. Cuthbertson*, 108 Pa., 395; s. c., 1 *Central Rep.*, 647.

*Gates v. Fleischer*, 67 Wisc., 504 (question based partly on hypothetical statement, and partly on assumption of what expert had heard testified by previous witness in the same cause.)

Hypothetical question, how framed, *Abb. Tr. Ev.*, 117, 311. *Criminal Brief*, 333-5, etc., § 582, etc.

§ 584. *Basis of facts for opinion.*—The opinion of an expert can be called for, although it was formed on hearsay, if the question put states the facts on which the opinion is based, in hypothetical form, and they may fairly be claimed to be supported by evidence already received.

*Cushman v. U. S. Life Ins. Co.*, 70 N. Y., 72. (Holding that the error in allowing a question expressly based on the hearsay, was not available on appeal, where only a general objection was made at the trial. The opinion was that of one physician founded on what another in attendance had told him.)

By an hypothetical question on facts suggesting several hypotheses, an expert may be asked, what would have been the indications on one or another hypothesis without first proving it to be the true one. *Erickson v. Smith*, 2 *Abb. Ct. App. Dec. (N. Y.)*, 64.

§ 585. *Doubtful facts may be assumed.*—Counsel may assume facts as they claim them to exist; and an error in the assumption does not make the question objectionable, if it is within the possible or probable range of the evidence.<sup>1</sup>

Hypothetical questions need not state facts as they exist. Each side may shape questions according to its theory.<sup>2</sup>

<sup>1</sup> *Harnett v. Garvy*, 66 N. Y., 641.

<sup>2</sup> *Cowley v. People*, 83 N. Y., 464; s. c., 38 *Am. Rep.*, 464; aff'g 8 *Abb. N. C.* 1; s. c., 21 *Hun (N. Y.)*, 415; *Filer v. N. Y. Central R. R. Co.*, 49 N. Y., 42; *Jackson v. N. Y. Central R. R. Co.*, 2 N. Y. *Supm. Ct. (T. & C.)*, 653; aff'd in 58 N. Y., 623, on this opinion.

§ 586. *Assuming fact without evidence.*—On direct examination, a question which assumes any material fact which there is no evidence to support, must be excluded.

*State v. Cross*, 68 Iowa, 180.

*State v. Hanley*, 34 Minn., 430; s. c., 26 *Northwest. Rep.*, 397.

*People v. Augsburg*, 97 N. Y., 501.



§ 587. *Preponderance of evidence not necessary.*—If the facts assumed by a hypothetical question are not unsupported by evidence in the case, the question cannot be excluded merely on the ground that in the opinion of the judge the facts are not established by a preponderance of evidence.

*Quinn v. Higgins*, 63 *Wisc.*, 664; s. c., 24 *Northwest Rep.*, 482. (Malpractice: Judgment reversed for error in this respect, among others.)

The test is, whether on the state of the evidence already in, a finding by the jury of such facts would be sustained; in other words, the facts assumed must be supported by sufficient evidence to go to the jury. *People v. Augsburg*, 97 *N. Y.*, 501.

§ 588. *Written question.*—The court may require counsel to reduce his hypothetical question to writing.

*Mayo v. Wright*, 63 *Mich.*, 32; s. c., 5 *Western Rep.*, 595.

Length of question not alone ground for exclusion. *Mayo v. Wright* (*above cited*).

§ 589. *Critical opinion of other testimony incompetent.*—A question calling for expert opinion upon evidence given by other witnesses, which covers a great variety of facts, is not competent if it calls for a comprehensive and critical view of the testimony given and the inferences to be drawn from the evidence of the witnesses.

*Guiterman v. Liverpool, N. Y. etc. S. S. Co.*, 83 *N. Y.*, 358. (Error to allow question to a nautical man; “under the circumstances detailed by these witnesses, and on the protest, and when (*stating further details*) what in your opinion should have been done by the persons in charge.” *MILLER, J.*, says: In order properly to form an opinion, the witness should have had full information, as to the ascertained or supposed state of facts upon which his opinion is based; and he could not be called upon to determine the truth of the facts sworn to before giving such opinion. Nor could the witness be called upon to testify unless a clear state of facts appeared; and it is not his province to draw inferences from the evidence of other witnesses, or to take in such facts as he can recollect, and thus form an opinion. . . .

The rule, after an examination of the authorities, we think, is that, in a case of this kind, a nautical man cannot be called upon to testify as to his opinion

upon evidence given by other witnesses, which covers a great variety of facts and calls for a comprehensive and critical view of the testimony given and the inferences to be drawn from the evidence of the witnesses. In this case, there was a discrepancy between the protest and some of the sworn testimony, perhaps not very important, yet at the same time of sufficient consequence to call for the discrimination of the witness as to the bearing of different parts [facts] upon the case, and which might not have been fully appreciated or understood without the attention of the witness being especially directed to the subject and the various facts connected therewith."

§ 590. *Reason*.—The expert's reason for his opinion may be called for on his examination in chief.

*Lewiston Steam Mill Co. v. Androscoggin Water Power Co.*, 78 *Me.*, 274; s. c., 2 *New Engl. Rep.*, 434.

§ 591. *Doubt*.—Where a witness has testified to a fact as to which opinion is competent, as for instance identity, he may be asked whether he has any doubt.<sup>1</sup>

Otherwise if he has declined to express an opinion.<sup>2</sup>

<sup>1</sup> *King v. N. Y. Central etc. R. R. Co.*, 72 *N. Y.*, 607.

<sup>2</sup> *Sanchez v. People*, 22 *N. Y.*, 147, 154. Compare *BELIEF*, § 188, p. 65.

592. *Cross-examination*.—On cross-examination abstract questions, and hypothetical questions not founded on evidence in the case, may be put for the purpose of testing the witness.<sup>1</sup>

This does not make him the witness of the cross-examiner within the rule against contradicting one's own witness.<sup>2</sup>

<sup>1</sup> *People v. Augsburg*, 97 *N. Y.*, 501 (holding this discretionary with the court).

*S. P., Louisville etc. R. Co. v. Falvey*, 104 *Ind.*, 409; s. c., 1 *Western Rep.*, 868.

<sup>2</sup> *Tucker v. Ely*, 20 *N. Y. Weekly Dig.*, 66.

§ 593. *Impugning expert's examination*.—When an expert has given testimony founded upon his own examination, the party affected has a right to give evidence that adequate examination was not made.

*Laughlin v. Grand Rapids Street Ry. Co.*, 62 *Mich.*, 220 (reversing judgment for excluding such evidence).

## ORDER OF COURT.

- |                                   |                                      |
|-----------------------------------|--------------------------------------|
| § 594. Copy.                      | § 599. Court order or judge's order. |
| 595. Order in special proceeding. | 600. Date, and term.                 |
| 596. Jurisdictional facts.        | 601. Entry for purpose of proving.   |
| 597. Best and secondary.          | 602. Ground.                         |
| 598. Informal order.              | 603. Impeaching.                     |

§ 594. *Copy*.—An order of another court may be proved by an exemplified copy,<sup>1</sup> or by a copy proved or formally certified under seal of the court to be an examined copy;<sup>2</sup> or by producing the judgment roll containing a copy of the order.<sup>3</sup>

<sup>1</sup> *Robert v. Good*, 36 *N. Y.*, 408. Compare *Wilson v. Conine*, 2 *Johns. (N. Y.)*, 280, where the original of an order after decree was required.

For distinction between exemplified and certified copies, see 1 *Abb. New. Pr. & F.*, 79, 80.

If the jurisdiction and pendency of the action are not proved or admitted they must of course be shown.

<sup>2</sup> *Robert v. Good (above cited)*.

*Mahoney v. Gunter*, 10 *Abb. Pr. (N. Y.)*, 431 (holding that an order of court cannot be proved by a copy signed and sealed by the judge).

<sup>3</sup> *Eighmy v. People*, 79 *N. Y.*, 546 (so holding on indictment for perjury in swearing before a referee appointed by the order).

At common law the minutes were not deemed a record; and an order only entered on the minutes could not be received as evidence that a judgment had been vacated. *Croswell v. Byrnes*, 9 *Johns. (N. Y.)*, 287; followed in *McKnight v. Dunlap*, 4 *Barb. (N. Y.)*, 36; *S. P.*, *Waldron v. Green*, 4 *Wend. (N. Y.)*, 409.

§ 595. *Order in special proceeding*.—An order made in a special proceeding is not admissible in evidence without the production of the roll or record of the proceedings in which the order was made.

*Mayer v. Mayor etc. of N. Y.*, 67 *Barb. (N. Y.)*, 323; mem. of s. c., 4 *Hun (N. Y.)*, 673; reaff'g 2 *Id.*, 306; s. c., 4 *N. Y. Supm. Ct. (T. & C.)*, 488 (*dictum*). Affirmed in 63 *N. Y.*, 455.

§ 596. *Jurisdictional facts*.—Recitals in the order, of the pendency of the action and of the jurisdictional facts, are evidence thereof, but not conclusive.

*Potter v. Merchants Bank*, 28 *N. Y.*, 641. (Supreme Court, order appointing receiver. Leading case.)

Dayton *v.* Johnson, 69 *N. Y.*, 419 (order revoking letters, reciting due service of citation).

*Contra:* in the case of a receiver's petition, referred to in an order directing assessment of premium notes for losses when offered in evidence against a third person. Thomas *v.* Whallon, 31 *Barb. (N. Y.)*, 172.

§ 597. *Best and secondary.*—The non-existence of any order on file, does not preclude giving secondary evidence, after proof of loss or destruction.<sup>1</sup>

But it is not alone sufficient evidence of loss or destruction to let in secondary evidence.<sup>2</sup>

<sup>1</sup> Fisher *v.* Mayor etc. of N. Y., 67 *N. Y.*, 73; rev'g 6 *Hun (N. Y.)*, 64.

Parol evidence is admissible to show that a temporary restraining order had been made and signed by the judge at chambers, and that it had been lost or mislaid, so that it could not be produced in evidence. Kiser *v.* Lovett, 106 *Ind.*, 325; s. c., 4 *Western Rep.*, 493.

<sup>2</sup> Eakin *v.* Vance, 10 *Sm. & M. (Miss.)*, 549; s. c., 48 *Am. Dec.*, 770.

Wright *v.* Nostrand, 47 *N. Y. Super. Ct. (J. & S.)*, 441; Josuez *v.* Conner, 7 *Daly (N. Y.)*, 448 (holding so, especially of a judge's order, which need not be filed).

§ 598. *Informal order.*—An oral order cannot be proved,<sup>1</sup> except in the few cases where a direction or decision given orally may be enforced.

But the formal entry of an order of a court, as actually declared, may be made at any time when necessary for the purpose of evidence.<sup>2</sup>

And entries in the common rule book where the practice of the court allows them,<sup>3</sup> and entries in the minutes before the record has been made up, are competent evidence.

<sup>1</sup> Medlin *v.* Platte Co., 8 *Mo.*, 235; s. c., 40 *Am. Dec.*, 135. (Not error to reject testimony of one of the judges of a lower court, that they verbally ordered an act done, where no written order or entry thereof was made in the records. Here a county court had orally assented that the name of a surety might be struck from a bond to the county.)

<sup>2</sup> People *v.* Myers, 2 *Hun (N. Y.)*, 6.

<sup>3</sup> Arundel *v.* White, 14 *East.*, 216 (entry of "withdrawn by plaintiff's order," to show termination of suit). Compare, Coopwood *v.* Preevitt, 30 *Miss.*, 206.

§ 599. *Court order or judge's order.*—An order entitled as made in court or reciting a hearing before the court, is a court order.

Matter of Village of Rhinebeck, 19 *Hun* (N. Y.), 346 (recital conclusive).

See further as to the distinction, and indicia, and amending, 1 *Abb. New Pr. & F.*, 240, 243.

That a judge's order made in the city of New York is equivalent to a court order (with few exceptions), *Id.*, 245.

§ 600. *Date, and term.*—An order will not be presumed to have been made at an irregular term.

People *ex rel.* Brooklyn Park Comm's v. City of Brooklyn, 3 *Hun* (N. Y.), 596; aff'd, *it seems*, in 60 N. Y., 642, without opinion.

For the significance of the date of an order, see 1 *Abb. New Pr. & F.*, 393, 394.

Presumption that term was regularly held, Dallas County v. McKenzie, 110 *U. S.*, 686; s. c., 28 *Law. ed.*, 285.

§ 601. *Entry for purpose of proving.*—An order in a former cause may be entered now for the purpose of proving it on the trial of the present cause; and the present trial may be adjourned, to enable such order to be entered that it may thereupon be proved.

Territory v. Christiansen (*Dak.*, 1887), 31 *Northwest. Rep.*, 849, and *cas. cit.*

§ 602. *Ground.*—An order not reciting the ground may be presumed, in support of it when collaterally in question, to have been made on any ground which might have availed under the papers on which it was made.

An order reciting the ground, will be presumed made on that ground alone.

Matter of Valentine, 3 *Abb. N. C.*, 285; s. c., 72 *N. Y.*, 184; rev'g 10 *Hun* (N. Y.), 83. Compare 1 *Abb. New Pr. & F.*, 252.

§ 603. *Impeaching.*—An order of court may be impeached for fraud and collusion in obtaining it.

Mandeville v. Reynolds, 68 *N. Y.*, 528; aff'g 5 *Hun* (N. Y.), 338. [See also Stilwell v. Carpenter, 2 *Abb. N. C.*, 238; Wilmerdings v. Fowler, 15 *Abb. Pr. N. S.* (N. Y.), 86.]

OWNERSHIP.—[For kindred topics, see ASSIGNMENT, GIFT, CLAIM, DELIVERY, POSSESSION. As to Real Property, see TITLE.]

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|-------------------------------|----------------------------|
| § 604. Direct testimony.      | § 609. Entries in account. |
| 605. Possession.              | 610. Source of ownership.  |
| 606. — of written instrument. | 611. — producing document. |
| 607. Hearsay.                 | 612. Continuance.          |
| 608. Marks, signs, etc.       |                            |

§ 604. *Direct testimony*.—Where ownership is incidentally involved, a witness may testify directly to it as a fact, subject to cross-examination.

*De Wolf v. Williams*, 69 *N. Y.*, 622; *Abb. Tr. Ev.*, 594, 623.

*Nelson v. Iverson*, 24 *Ala.*, 9 ; s. c., with note, 60 *Am. Dec.*, 442.

So as to whether goods “belonged” to a specified person, *Rocke v. Meiner*, 34 *N. Y. Super. Ct. (J. & S.)*, 158.

—For the *contrary* rule see *Dunlap v. Berry*, 4 *Scam. (Ill.)*, 327 ; s. c., 39 *Am. Dec.*, 43.

§ 605. *Possession*.—When ownership is incidentally involved, evidence of possession is sufficient to go to the jury, in the absence of evidence tending to explain the possession otherwise.

*Fish v. Skut*, 21 *Barb. (N. Y.)*, 333. (Action for killing sheep by defendant's dog: proof that they were killed on plaintiff's premises, sufficient.)

*State v. Boone*, 70 *Mo.*, 649 (possession in seller justifies buyer, as against charge of larceny).

*People v. Nelson*, 56 *Cal.*, 77 (possession sufficient, as against thief, on trial for robbery or larceny).

*Nichols v. State*, 68 *Wisc.*, 416; s. c., 32 *Northwest. Rep.*, 543, 547 (exclusive possession, occupancy and control of railroad car by express company, prima facie shows ownership; on indictment for breaking and entering).

§ 606. — *of written instrument*.—In case of a written instrument, even when ownership is directly in issue, possession is sufficient without showing how it was acquired, if the instrument be payable to the person producing it, or to bearer; in the absence of evidence tending to explain the possession otherwise,<sup>1</sup> or raising suspicion as to how it was acquired.<sup>2</sup>

If not so payable, possession is not alone evidence of ownership.<sup>3</sup>

<sup>1</sup> *Gibson v. National Park Bank*, 98 *N. Y.*, 87 (possession of check payable to order of possessor, explainable by evidence of fiduciary capacity).

<sup>2</sup> See DELIVERY.

*Brown v. Taylor's Committee*, 32 *Gratt. (Va.)*, 135, overruling *Bell v. Moon*, 79 *Va.*, 341. (If A. writes an obligation to B. on the fly leaf of a book belonging to C., the paper belongs to C., but this fact, even in addition to the possession, is no evidence that the obligation belongs to C.)

But the executor's possession of unendorsed negotiable paper in terms payable to the order of the testator, is evidence of ownership. *Scoville v. Landon*, 50 *N. Y.*, 686.

§ 607. *Hearsay*.—Neither general reputation, nor evidence of whose the thing was called in the family,<sup>1</sup> is competent as tending to show ownership, unless in connection with evidence bringing the fact home specifically to the person against whom it is offered.

<sup>1</sup> *Curtis v. Packer*, 4 *N. Y. Weekly Dig.*, 12.

*Panty v. Wahle*, 16 *Id.*, 462.

§ 608. *Marks, signs, etc.*—The existence of the usual indicia, such as brands upon cattle,<sup>1</sup> marks upon packages of goods,<sup>2</sup> and inscriptions of names on signboards,<sup>3</sup> are competent as tending to show possession and ownership.

They may be proved by one who has read them without producing the thing itself.<sup>4</sup>

<sup>1</sup> *State v. Cardelli*, 19 *Neb.*, 319; s. c., 10 *Pacif. Rep.*, 433, 440. (Brands and marks competent as evidence of ownership of cattle unless excluded by statute.)

*People v. Bolanger*, 71 *Cal.*, 17; s. c., 11 *Pacif. Rep.*, 799 (unrecorded earmark).

But see as to effect of unrecorded statutory brand, *Alexander v. State*, 24 *Tex App.*, 126; s. c., 4 *Southwest. Rep.*, 840.

To show mistake in brand, evidence is competent that by accident brands are sometimes inverted which may give the character used a different significance or value. *Boren v. State*, 23 *Tex. App.*, 23; s. c., 4 *Southwest. Rep.*, 463.

<sup>2</sup> *Taylor v. United States*,<sup>3</sup> *How. (U. S.)*, 197; s. c., 11 *Law. ed.*, 559. (On a question of fraudulent importation of goods, an invoice of other goods entered at another port, but marked like those seized, is proper evidence to strengthen the true ownership of packages with his mark.)

<sup>3</sup> *Abb. Tr. Ev.*, 591.<sup>4</sup> *Criminal Trial Brief*, 262, § 438.

§ 609. *Entries in accounts.*—The entries in the accounts of the alleged possessor or owner are not competent in his own favor, as evidence of ownership or possession,<sup>1</sup> unless made as part of the *res gestæ* of an act already properly in evidence, or otherwise regularly proved in connection with testimony of a witness.<sup>2</sup>

<sup>1</sup> *Brown v. Thurber*, 58 *How. Pr. (N. Y.)*, 95 ; (*N. Y. Ct. of App.*), mem. of s. c., 77 *N. Y.*, 613.<sup>2</sup> See ACCOUNTS.

§ 610. *Source of ownership.*—Where ownership is directly involved, evidence of sale and delivery to the alleged owner by one who was in possession, raises a legal presumption of ownership,<sup>1</sup> in the absence of anything to impair the presumption of the seller's ownership or power to sell, arising from his possession.<sup>2</sup>

If the sale was on execution<sup>3</sup> or attachment<sup>4</sup> the process must be proved, and, as against a party to the action, is enough.<sup>5</sup> As against a stranger the judgment must be proved.<sup>6</sup>

<sup>1</sup> *McKeage v. Hanover Fire Ins. Co.*, 81 *N. Y.*, 38 : s. c., 37 *Am. Rep.*, 471, with note; aff'g 16 *Hun (N. Y.)*, 239 (movable fixtures sold by one in possession of them and of the realty).*Holbrook v. N. J. Zinc Co.*, 57 *N. Y.*, 616 (transfer of stock).As to ownership as dependent on *Installment Sales*, see 21 *Abb. N. C.*, 189; on *Conditional Sales*, 15 *Id.*, 394 n.<sup>2</sup> *Atkins v. Hosley*, 3 *N. Y. Supm. Ct. (T. C.)*, 322 (judgment against seller competent to disprove his title).<sup>3</sup> *Yates v. St. John*, 12 *Wend. (N. Y.)*, 74 ; *S. P., Dane v. Mallory*, 16 *Barb. (N. Y.)*, 46..<sup>4</sup> *Goodman v. Moss*, 64 *Miss.*, 303; s. c., *Southern Rep.*, 241.<sup>5</sup> *Yates v. St. John (above cited)*.<sup>6</sup> *Id.*

§ 611. — *producing document.*—To prove a bill of sale<sup>1</sup> on mortgage<sup>2</sup> as the source of title, the instrument must be produced, or a foundation laid for secondary evidence



Otherwise of a bill of parcels or receipt accompanying an oral sale.<sup>3</sup>

<sup>1</sup> *Dunn v. Hewitt*, 2 *Den. (N. Y.)*, 637.

<sup>2</sup> *George v. Toll*, 39 *How. Pr. (N. Y.)*, 597.  
*S. P.*, *Bray v. Flickinger*, 69 *Iowa*, 167.

<sup>3</sup> *Abb. Tr. Ev.*, 623.

§ 612. *Continuance.*—The presumption that a fact shown once to have existed, continues, applies to ownership.<sup>1</sup>

<sup>1</sup> *Hagar v. Clark*, 78 *N. Y.*, 45; rev'g 12 *Hun (N. Y.)*, 524 (general owner of ship presumed to continue such during voyage under charter party).

*Fry v. Bennett*, 28 *N. Y.*, 324; aff'g 3 *Bosw. (N. Y.)*, 200. (Proprietor of a newspaper in 1848 and 1849, presumed to continue such in 1851.)

PAYMENT.—For other points, see *Trial Evidence*; also ACCOUNTS.]

§ 613. Exchanging receipts.

§ 614. Entry in bank books.

§ 613. *Exchanging receipts.*—Payment may be proved by exchange of receipts or setting off one debt against another without passing cash.

See *James v. Cowing*, 82 *N. Y.*, 449; rev'g 17 *Hun (N. Y.)*, 256.

*Spargo's Case*, *L. R.* 8 *Ch. App.*, 407, 412.

*The Heinrich Bjorn*, 49 *L. T. R.*, *N. S.*, 405.

*Brant v. Ehlen*, 59 *Md.*, 1.

*Holcomb v. Campbell*, 42 *Hun (N. Y.)*, 398.

*Contra*: of mere set-off when relied on to satisfy statute of frauds. *Mattice v. Allen*, 3 *Abb. Ct. App. Dec. (N. Y.)*, 248; rev'g 33 *Barb. (N. Y.)*, 543. *Walrath v. Richie*, 5 *Lans. (N. Y.)*, 362.

§ 614. *Entry in bank books.*—Payment may be proved by the entry of a charge of a check and corresponding credit in the books of the bank, with the same effect as if the money had been actually paid and repaid.

*Pratt v. Foote*, 9 *N. Y.*, 463, 468.

PERFORMANCE.—[For kindred topics, see DELIVERY, and INDUCEMENT.]

§ 615. *Direct testimony.*—A question which calls for a general summary or opinion of the witness as to whether

a person has done as agreed, is inadmissible ; the testimony should be confined to a statement of what was done.

Nicholl *v.* White, 41 *Hun* (N. Y.), 152.

PHOTOGRAPHS, MAPS, PLANS, ETC.—[As to what facts these may be received to show, see *CONDITION*, and *IDENTITY*.]

§ 616. Copy.

617. Witness to correctness.

718. Preliminary question.

§ 619. Lay figures inserted.

920. Conflict of evidence.

§ 616. *Copy*.—A photograph is not incompetent merely because not an original, but copied from an original photograph.

Wilcox *v.* Wilcox, 46 *Hun* (N. Y.), 32.

§ 617. *Witness to correctness*.—In order to prove the correctness of a photograph it is not necessary to call the person who took it ; nor that the witness should be able to say from what point it was taken.

Archer *v.* N. Y. New Haven etc. R. R. C., 106 N. Y., 589.

§ 618. *Preliminary question*.—The preliminary question whether a plan, etc., shown is correct, is proper, though leading.

Stuart *v.* Binsse, 10 *Bosw.* (N. Y.), 436.

§ 619. *Lay figures inserted*.—A photograph is not incompetent because persons were stationed to be taken in it to indicate the points at which stood the actors in the scene involved in the issue.

People *v.* Jackson, 111 N. Y., 362 ; s. c., 19 *Northeastern Rep.*, 54

§ 620. *Conflict of evidence*.—Mere conflict or evidence as to correctness does not render a map, plan or photograph incompetent ;<sup>1</sup> but the adverse party may put in one he deems correct.<sup>2</sup>

<sup>1</sup> Moon *v.* State, 68 *Ga.*, 687, 695 (homicide: diagram prepared for purposes of the trial).

<sup>2</sup> *Id.*

PLACE.—[As to *BOUNDARIES* and *DISTANCE*, see those titles.]

§ 621. Judicial notice.

622. —political division.

§ 623. Inferring from proximity.

§ 621. *Judicial notice.*—The court may judicially notice a place by reason of the historical<sup>1</sup> or geographical<sup>2</sup> familiarity of its name.

<sup>1</sup> *Hart v. Bodley, Hard. (Ky.)*, 98 (name of a battlefield used in describing premises).

*Bond v. Perkins*, 4 *Heisk. (Tenn.)*, 364 (place within confederate lines).

Compare *Boston v. State*, 5 *Tex. App.*, 383 (reversing conviction on the ground that the court could not take notice that a given locality on the road between two towns was within a specified county).

<sup>2</sup> *Cash v. Auditor of Clark Co.*, 7 *Ind.*, 227 (falls of Ohio river).

[See cases on the general subject collected in *Am. Law. Rev.*, Sept., 1885.]

§ 622. — *political divisions.*—The rule that the court will take notice of political divisions does not require it to take notice of local divisions made by local officers as distinguished from those made by the legislature or by public act of some branch of the executive department of the state government.<sup>1</sup>

It may<sup>2</sup> but is not bound<sup>3</sup> to notice that a certain railroad runs through a given county.

<sup>1</sup> *Bragg v. Commissioners of Rush Co.*, 34 *Ind.*, 405, 410 (refusal to notice that there was no town in the state of a given name, because county commissioners may form and name a town).

<sup>2</sup> *Indianapolis etc. R. R. Co. v. Case*, 15 *Ind.*, 42.

<sup>3</sup> *Indianapolis etc. R. R. Co. v. Stephens*, 28 *Ind.*, 429.

§ 623. *Inferring from proximity.*—The place of an occurrence as whether within or without a specified county or other division, may be inferred from evidence of proximity to a place within that county or division.

*Indianapolis etc. R. R. Co. v. Stephens*, 28 *Ind.*, 429.  
(Proof that an accident happened within half a mile of the town held sufficient that it happened within the county.)

For other illustrations, see *Criminal Trial Brief*, 412, §§ 681–683.

## POPULATION.

§ 624. *Judicial notice* may be taken of the population of counties, towns, cities, etc.

Farley v. McConnell, 7 *Lans.* (N. Y.), 428 ; aff'd, without opinion, in 52 *N. Y.*, 630.

State v. Dolan, 93 *Mo.*, 467; s. c., 12 *Western Rep.*, 259; 6 *Southwest. Rep.*, 366.

And the national census is admissible for the purpose. Fulham v. Howe, 60 *Vt.*, 351; s. c., 6 *New Engl. Rep.*, 663; 14 *Atl. Rep.*, 652. See also JUDICIAL NOTICE.

POSITION.—[For kindred topics, see CONDITION and PLACE.]

§ 625. *Direct testimony*.—Testimony of a witness to the place or position of an object he observed is not rendered incompetent by his qualifying the statement by indicating the reason why he judged it to be so;<sup>1</sup> as distinguished from testifying to mere matter of opinion.<sup>2</sup>

<sup>1</sup> Hallahan v. N. Y. Lake Erie & W. R. R. Co., 102 *N. Y.*, 194.

Manke v. People, 17 *Hun* (N. Y.), 416; approved in State v. Jones (*Kans.*), 8 *Crim. L. R.*, 148.

POSSESSION.—[For kindred topics, see DELIVERY, CLAIM, INTENT. As to personal property, see also OWNERSHIP; as to real property, TITLE.]

§ 626. Direct testimony.

627. Title.

628. Property tax, etc.

§ 629. Judgment against third person.

630. Presumption of continuance.

§ 626. *Direct testimony*.—Actual possession, or occupation, of lands or chattels, as distinguished from legal or constructive possession, is a fact of observation, and may be testified to directly by a witness,<sup>1</sup> subject to cross-examination on details.

Otherwise of the possession of what is shown not to be in the actual occupation of anyone, such as unenclosed woodland.<sup>2</sup>

Fisher v. Bennehoff, 121 *Ill.*, 426; s. c., 11 *Western Rep.*, 82; 13 *Northeast. Rep.*, 150.

Hardenburgh v. Crary, 50 *Barb.* (N. Y.), 32.

Knapp v. Smith, 27 *N. Y.*, 277; *Abb. Tr. Ev.*, 590, 594, 623, 635, 692.

<sup>2</sup> And a witness who has described in detail his acts, may be allowed to characterize those acts as a taking of possession. Keller v. Paine, 34 *Hun* (N. Y.), 167, 176. Such testimony has no weight against facts showing precisely what was done. Steele v. Benham,

84 *N. Y.*, 634; rev'g 21 *Hun (N. Y.)*, 411 (mortgagee's testimony that he took and kept possession).

<sup>3</sup> *Miller v. Long Island R. R. Co.*, 71 *N. Y.*, 380; rev'g 9 *Hun (N. Y.)*, 194.

§ 627. *Title*.—Evidence of title raises a legal presumption of legal or constructive possession,<sup>1</sup> but not of actual possession or occupancy.<sup>2</sup>

<sup>1</sup> *Pope v. Hanmer*, 74 *N. Y.*, 240, 245; aff'g 8 *Hun (N. Y.)*, 265.

*Abb. Tr. Ev.*, 692.

<sup>2</sup> *Churchill v. Onderdonk*, 59 *N. Y.*, 194; *Abb. Tr. Ev.*, 717.

§ 628. *Paying tax, etc.*—Payment of taxes, etc., upon unoccupied, uninclosed and unimproved lands is no evidence of possession.<sup>1</sup> Otherwise of payment of license fee for occupied premises.<sup>2</sup>

<sup>1</sup> *Miller v. Long Island R. R. Co.*, 71 *N. Y.*, 380; rev'g 9 *Hun (N. Y.)*, 194.

*S. P.*, *Thompson v. Burhans*, 61 *N. Y.*, 52; rev'g 67 *Barb. (N. Y.)*, 260.

<sup>2</sup> *Wing v. Disse*, 15 *Hun (N. Y.)*, 190. (Evidence of payment of a license fee for a saloon kept on the premises, and of the name over the door, is admissible to show possession.)

§ 629. *Judgment against third person*.—A judgment awarding possession, or other legal proceedings founded on possession, are competent even against one who was not a party thereto, not for the purpose of concluding him as to title or right, but as showing possession and how acquired.

*Chirac v. Reinicker*, 11 *Wheat. (U. S.)*, 280; s. c., 6 *Law. ed.*, 474.

*Bradt v. Church*, 39 *Hun (N. Y.)*, 262.

And see *Nickerson v. Thacher*, 146 *Mass.*, 609; s. c., 6 *New Engl. Rep.*, 272; 16 *Northeast. Rep.*, 581.

§ 630. *Presumption of continuance*.—Whether there is a presumption that actual possession shown once to have existed, continued, depends on circumstances.

*Cleveland v. Crawford*, 7 *Hun (N. Y.)*, 616 (holding that there is not for the purpose of enabling one to bring an action to determine conflicting claims).

*Bethel v. Linn*, 63 *Mich.*, 464; s. c., 6 *Western Rep.*, 167, 170 (continued possession of merchandise in a stock of goods, for sale, not presumed).

Continued possession of money is not presumed, but rather the contrary. *Ogden v. Wood*, 51 *How. Pr. (N. Y.)*, 375, 377 (holding that the presumption of the continuance of a fact would not sustain a creditor's action to reach merely money, shown to have been once received).

*Contra*: *Bockenstead v. Perkins*, 73 *Iowa*, 23; s. c., 34 *Northwest. Rep.*, 488 (money presumed to remain in guardian's hands, six days, in order to charge new bondsmen).

POSSIBILITY.—[For kindred topics, see CAUSE, and NEGATIVE.]

§ 631. *What could have been.*—On a matter within the experience of men in the ordinary walks of life and of common observation, the question what could have been done by another person under given circumstances, is not competent.<sup>1</sup>

But on a question requiring special knowledge a skilled witness may be asked such question.<sup>2</sup>

<sup>1</sup> *Jones v. State*, 71 *Ind.*, 66 (whether deceased seated at a window could have seen an assailant who fired from without, not competent).

*Haggerty v. Brooklyn City etc. R. R. Co.*, 61 *N. Y.*, 624; s. c., 6 *Abb. N. C.*, 129 *n.* (Unskilled witnesses of a casualty cannot be asked if anything could have been done to have prevented it.)

<sup>2</sup> *Mott v. Hudson R. R. Co.*, 8 *Bosw. (N. Y.)*, 345. (A witness who testifies that he is somewhat familiar with railroad brakes and their operation, has used them, and knows which are the best, is competent to testify as to the distance within which any given train can be stopped, with a designated class of brakes and a given number of brakemen.)

*Freeman v. Travelers Ins. Co.*, 144 *Mass.*, 572; s. c., 12 *Northeast. Rep.*, 372 (conductor competent to testify that train might have been stopped sooner than it was).

PREGNANCY.—[For kindred topics, see CONDITION, FEELINGS, HEALTH.]

§ 632. Opinion.

§ 632a. Inspection.

§ 632. *Opinion* —A married woman who has borne children and who had adequate opportunity of observing a woman, may testify whether her physical appearance was like that of other women when pregnant.

*Doe v. Roe*, 32 *Hun* (N. Y.), 628 (so held of evidence in mitigation of slander in imputing unchastity).

§ 632a. *Inspection by jury of matrons, or by medical expert.*

1 *Bish. Cr. Pr.*, § 1324; 3 *Harv. Law Rev.*, 45.

PREMISES.—[For kindred topics, see *CONDITION*, and *IDENTITY*.]

§ 633. *Oral evidence* is competent to show whether certain parts are or are not parcel of premises ambiguously described in any written instrument,<sup>1</sup> unless the ambiguity renders it void on its face for uncertainty.

*Cary v. Thompson*, 1 *Daly* (N. Y.), 35.

*Crawford v. Morris*, 5 *Gratt.* (Va.), 98.

See *Abb. Tr. Ev.*, 527.

<sup>1</sup> *Atkinson v. Cummins*, 9 *How.* (U. S.), 479, 485; s. c., with note, 13 *Law. ed.*, 223 (sheriff's deed; oral evidence of how mistake occurred, and what took place at the sale; and of the practical construction put by the purchaser, etc., competent).

*Sargent v. Adams*, 3 *Gray* (Mass.), 72; s. c., 63 *Am. Dec.*, 718. (Oral evidence is admissible to explain a patent ambiguity in a written agreement to lease "for a term of ten years the 'Adams House' so called," by showing that the intention of the parties was to include only that part of the building fitted up as a hotel by the name of "The Adams House" and not the separate stores which occupied the whole of the ground floor except the part used as an entrance to the hotel.)

*Hall v. Benner*, 21 *Am. Dec.*, 394 (error to exclude oral evidence offered to show whether a shop, dam, etc., were included in a sale of certain lots of land; saying that when the extent of the claim is not apparent on the face of the deed, evidence of what was usually let or occupied with the land, mill or manor conveyed, is competent).

*Frantz v. Ireland*, 66 *Barb.* (N. Y.), 386 (description in judgment roll).

*Patch v. White*, 117 *U. S.*, 210; S. P., *Abb. Tr. Ev.*, 143 (wills).

*Christ v. Thompson* (Pa., 1886), 2 *Centr. Rep.*, 523 (location of adjoining tracts, competent).

*Dardonville v. Lewis*, 7 *N. Y. Weekly Dig.*, 188 (deed of adjoining tract not competent).

PRESENCE.—[For kindred topics, see *ABSENCE*.]

§ 634. *Constructive.*—Presence for the purpose of prov-

ing the accused to have been a principal in a crime, must be proved ; but constructive presence is enough.

*McCarney v. People*, 83 *N. Y.*, 408, 413; *FOLGER, J.*, says : " Constructive presence is made out when it is shown that he acted with another in the pursuance of a common design ; that he acted at one and the same time for the fulfillment of the same preconcerted end and was so situated as to be able to give aid to his associate, with a view to insure the success of the common enterprise. A waiting and a watching at a convenient distance is enough ; as if, in a case of larceny, he be placed where he may learn of the whereabouts and movements of the custodian of the property, and be prepared to lure him away, or to retard him, or to give timely warning of his approach."

## PRINTING.

§ 635. Comparison.

§ 635a. Several impressions of same issue.

§ 635. *Comparison*.—From a comparison of the types, devices, etc., of two newspapers, one of which is clearly proved, and the other imperfectly, the jury may infer that both were printed by the same person.

*McCorkle v. Binns*, 5 *Binn. (Pa.)*, 340 ; s. c., 6 *Am. Dec.*, 420.

§ 635a. *Several impressions of same issue*.—It is enough to produce one copy with testimony that the copy to which the evidence relates was similar in all respects.

*Huff v. Bennett*, 4 *Sandf. (N. Y.)*, 120; and see *Same v. Same*, on appeal, 6 *N. Y.*, 337 (libel).

**QUALITY.**—[For kindred topics, see **ADULTERATION**, **CONDITION**, **CONSTRUCTION**, and **IDENTITY**.

§ 636. Direct question.

§ 638. Inspection in court.

637. Comparison : reference to other specimen.

§ 636. *Direct question*.—On a subject not within the common knowledge and experience of men in the ordinary walks of life and of common education, an expert witness who has testified to the facts may be asked directly as to quality, as for instance whether cabinet work was a good job, and well done;<sup>1</sup> or whether a specified invention was equal to the best.<sup>2</sup>

<sup>1</sup> *Ward v. Kilpatrick*, 85 *N. Y.*, 413, 416.



<sup>2</sup> *Scattergood v. Wood*, 79 *N. Y.*, 263; s. c., 35 *Am. Rep.*, 515.

[The competency to testify to quality is not confined to professional experts; but such testimony is received from any person having a practical conversance with articles of the kind.

Thus farmers and dairymen well acquainted with milk, and showing themselves competent to judge whether it was diluted or not, are competent to testify whether milk looked and tasted like milk and water. *Lane v. Wilcox*, 55 *Barb. (N. Y.)*, 615.

And one who drank beer, may be required to say whether he thought it was lager beer. *Comm. v. Moinehan*, 140 *Mass.*, 463; s. c., 1 *New Engl. Rep.*, 591].

Under a contract of purchase of an article of merchandise of a specified grade, which contract was couched in technical terms and abbreviations; plaintiff tendered with the goods a certificate of the quality by certain chemists. *Held*, in an action for the unpaid price, that it was competent to prove the meaning of the technical terms of the contract according to the custom of the trade, and that by such custom the certificate offered was recognized as evidence of quality. *Baker v. Squier*, 1 *Hun (N. Y.)*, 448; s. c., 3 *N. Y. Supm. Ct. (T. & C.)*, 465 (compare MEASURE).

§ 637. *Comparison; reference to other specimen.*—On the question of the quality of an article it is competent to prove the quality of another, if evidence be also given that the two were of the same quality.<sup>1</sup> Otherwise not.<sup>2</sup>

*Ames v. Quimby*, 106 *U. S.*, 342; s. c., 27 *Law. ed.*, 100 (goods furnished to another person, proved to be of same quality as those furnished to the party).

<sup>2</sup> *Albany & Rensselaer Co. v. Lundberg*, 121 *U. S.*, 451; s. c., 30 *Law. ed.*, 982; 7 *Sup. Ct. Rep.*, 958 (evidence as to product of mine in previous years, incompetent without showing identity of quality).

*Fillo v. Jones*, 2 *Abb. Ct. App. Dec. (N. Y.)*, 121; s. c., 4 *Keyes (N. Y.)*, 328 (holding thus also of fireworks).

*Campbell v. Russell*, 139 *Mass.*, 278; s. c., 1 *Northeast. Rep.*, 345 (different houses).

*Morawetz v. McGovern*, 68 *Wisc.*, 312; s. c., 32 *Northwest. Rep.*, 290 (construction of ice boxes).

§ 638. *Inspection in court.*—On the question of the quality of a thing which requires testimony of experts,—such as the mortar used in a building which fell,—a sample may be exhibited to the jury, and a specimen of a good article of

the same kind proved to be good may be shown them for comparison.

*People v. Buddensieck*, 103 *N. Y.*, 487, 498; s. c., 5 *N. Y. Crim. R.*, 69; aff'g 4 *Id.*, 230, 262.

QUANTITY.—[For kindred topics, see MEASURE, and WEIGHT.]

§ 639. Direct testimony.

§ 641. Comparison.

640. Re-count.

§ 639. *Direct testimony*.—Quantity is a subject in reference to which a witness may testify directly upon personal observation.<sup>1</sup> And a question calling for the witness' answer to the best of his judgment, is not objectionable as calling for mere opinion.<sup>2</sup>

*Bass Furnace Co. v. Glasscock*, 82 *Ala.*, 452; s. c., 2 *Southern Rep.*, 315.

*Collins v. N. Y. Central etc. R. R. Co.*, 109 *N. Y.*, 243; (rev'g 23 *N. Y. Weekly Dig.*, 154, for exclusion of such question).

<sup>2</sup> *Townsend v. Brundage*, 6 *N. Y. Supm. Ct. (T. & C.)*, 527; mem. of s. c., 4 *Hun (N. Y.)*, 264.

Compare, *Thomas v. Kenyon*, 1 *Daly (N. Y.)*, 132 (non-expert not competent to testify to quantity of rain falling on specified area).

§ 640. *Re-count*.—To show a mistake in a count it is competent to prove a re-count made by another person though at a different place and time.

*Standard Oil Co. v. Van Etten*, 107 *U. S.*, 325, 332; s. c., 27 *Law. ed.*, 319 (holding that in the absence of evidence, it would not be presumed that any articles were lost in course of transmission to such other place, by regular shipment).

§ 641. *Comparison*.—To prove a quantity not exactly known it is competent to show how far it went as materials for given work, the quantity required for which is known.

*Miller v. Shay*, 142 *Mass.*, 598; s. c., 3 *New Engl. Rep.*, 132 (quantity of sand shown by number of casks of lime used with it in making mortar).

S. P., MEASURE, § 524.

RATIFICATION.—[For kindred topics, see ACQUIESCENCE, AGENCY, and CORROBORATION].

§ 642. Allegation.

643. How proved.

644. Executory contract.

645. Legal effect.

§ 646. Aid by evidence of agency.

647. Silence on receipt of letter.

648. What may be ratified.

§ 642. *Allegation*.—Under allegation of authority evidence of subsequent ratification is admissible.

*Hoyt v. Thompson*, 19 *N. Y.*, 207.

*Hoosac Mining etc. Co. v. Donat*, 10 *Colo.*, 529; s. c., 16 *Pacific Rep.*, 157.

§ 643. *How proved*.—To prove ratification there must be either evidence that the acts relied on as constituting the ratification were done with full knowledge of all the material facts,<sup>1</sup> in which case intent to ratify need not be shown, and evidence to negative intent is incompetent;<sup>2</sup> or evidence of acts or declarations manifesting a decisive intent to assume responsibility for the act claimed to be ratified,<sup>3</sup> in which case the party proving ratification need not in the first instance give evidence that the party ratifying had knowledge of the facts.

<sup>1</sup> *Nixon v. Palmer*, 8 *N. Y.*, 398, 401.

*Ritch v. Smith*, 82 *N. Y.*, 627; s. c., 60 *How. Pr. (N. Y.)*, 159; rev'g *Id.*, 157. (Acceptance of part of principal on mortgage [paid agent before it was due] without knowing that such payments were in consideration of an extension, no evidence of ratification of agent's authority to extend.)

*Owings v. Hull*, 9 *Pet. (U. S.)*, 607 (holding evidence of the communications between them competent, to show knowledge; and error to instruct the jury that if the principal ratified his agent's act it was immaterial whether he knew of the facts or not).

*Bloomfield v. Charter Oak Bank*, 121 *U. S.*, 121; s. c., 30 *Law. ed.*, 923; 7 *Sup. Ct. Rep.*, 865.

<sup>2</sup> *Hazzard v. Spears*, 2 *Abb. Ct. App. Dec. (N. Y.)*, 353 (sustaining refusal to instruct the jury that if the principal did not intend by his silence with knowledge of the facts to ratify, there was no ratification.)

<sup>3</sup> *Ahern v. Goodspeed*, 72 *N. Y.*, 108; aff'g 9 *Hun (N. Y.)*, 263.

§ 644. *Executory contracts*.—Knowledge need not be shown, but constructive notice is enough, in case of a continuing course of transaction, as distinguished from a past and completed transaction.

*Higgins v. Armstrong*, 9 *Colo.*, 38; s. c., 10 *Pacific Rep.*, 232.

*Compare, Murray v. Nelson Lumber Co.*, 143 *Mass.*, 250; s. c., 3 *New Engl. Rep.*, 419.

§ 645. *Legal effect*.—It is not necessary to show knowl-

edge of the legal effect of the facts,<sup>1</sup> except in case of a ratification by a *cestui que* trust of an act by the trustee in contravention of his duty.<sup>2</sup>

<sup>1</sup> *Kelley v. Newburyport & Amesbury R. R. Co.*, 141 *Mass.*, 496; s. c., 5 *Eastern Rep.*, 301; 2 *New Engl. Rep.*, 384.

<sup>2</sup> *Hoffman etc. Co. v. Cumberland, etc. Co.*, 16 *Md.*, 456; 508. (The court said: "At the time of the supposed ratification, the principal must have been fully aware of every material circumstance of the transaction, the real value of the subject of the contracts, and his act of ratification must have been an independent and substantive act founded on complete information and on perfect freedom and volition, and in addition to all this the *cestui que* trust must not only have been acquainted with the facts, but apprised of the law how those facts would be dealt with if brought before a court of equity" (citing *Lewin on Trusts*, ed. 1858, p. 615).

§ 646. *Aid by evidence of agency.*—Where an agency actually exists, slight evidence is sufficient;<sup>1</sup> and mere acquiescence of the principal raises the presumption of an intentional ratification of the act.~ The relation of husband and wife between the parties, strengthens the presumption.<sup>3</sup>

<sup>1</sup> *Parish of St. James v. Newburyport etc. R. R. Co.*, 141 *Mass.*, 500; s. c., 2 *New Engl. Rep.*, 593.

<sup>2</sup> *Fowler v. Lockwood*, 3 *Redf. (N. Y.)*, 465.

<sup>3</sup> *Id.*

§ 647. *Silence on receipt of letter.*—Where an agent has exceeded his authority, an intention to ratify will be presumed from the silence of the principal, after receiving a letter informing him what has been done; and this is a legal presumption which, in the absence of other evidence, is conclusive.

*Field v. Farrington*, 10 *Wall. (U. S.)*, 141; s. c., 19 *Law. ed.*, 923 (as to the latter point, a *dictum*).  
And see note in 79 *Am. Dec.*, 387.

§ 648. *What may be ratified.*—The doctrine of ratification enables one to take the benefit of an act done in his behalf by another person; and such ratification may be presumed in furtherance of justice.<sup>1</sup>

But it does not enable one to take the benefit of a fraudulent act done in his name, but not for his benefit.<sup>2</sup>

<sup>1</sup> *Bennett v. Hunter*, 9 *Wall. (U. S.)*, 326, 338. Followed in *Tacey v. Irwin*, 18 *Id.*, 549.

<sup>2</sup> *Garvey v. Jarvis*, 46 *N. Y.*, 310; *aff'g* 54 *Barb. (N. Y.)*, 179 (unless there has been some *estoppel*, or some injury to the rights of the assumed principal).

And see *AGENCY*, §§ 123, 124.

## REASON,

§ 649. *Right to prove*.—When the circumstances of an act, the significance of which depends upon intent, have been proved by one party, the other party has a right to prove by the witness, whose intent is in question, the reason for any relevant circumstances.

*Bank v. Kennedy*, 17 *Wall. (U. S.)*, 19, 26. (The court say: whatever it was, the reason should go with the fact.)

## REASONABLENESS.

§ 650. Reasonable diligence. .

§ 651. Reasonable time.

§ 650. *Reasonable diligence*.—If the facts are disputed, or, being undisputed, are of such a nature that reasonable men might differ in regard to the inferences proper to be drawn from them, then those inferences are to be drawn by a jury, under proper instructions from the court.

*Mead v. Parker*, 22 *Abb. N. C.*, 129, 133.

§ 651. *Reasonable time*.—If there is no conflict in the evidence as to the facts on which reasonable time depends, the question is for the court.<sup>1</sup>

If there is such conflict (and the rule should be the same where credibility of testimony is in doubt), the question is a mixed one of law and fact.<sup>2</sup>

<sup>1</sup> *Wiggins v. Burkhām*, 10 *Wall. (U. S.)*, 129; *s. c.*, 19 *Law. ed.*, 884.

*Wright v. Bank of Metropolis*, 110 *N. Y.*, 237, 249.

*Holt on Concurrent Jurisd.*, 149, § 129, says that this is not the rule in New York, but this is a misapprehension, and the cases cited do not sustain that statement.

<sup>2</sup> *Standard Oil Co. v. Van Etten*, 107 *U. S.*, 325; *s. c.*, 27 *Law. ed.*, 319.

REBUTTAL.—[For kindred topics, see *CORROBORATION*, *CAUSE*, and *OPINIONS*.

§ 652. Cumulative testimony in rebuttal. § 653. Allegation.

§ 652. *Cumulative testimony in rebuttal*.—If the testimony of a witness on direct, to a fact in issue, has been directly contradicted by the adversary's evidence in reply, the party who adduced the testimony may be allowed on rebuttal to call another witness to prove the same fact.

Green *v.* Gould, 85 *Mass.* (3 *Allen*), 465.

Sherwood *v.* Titman, 55 *Penn. St.*, 77. (*Held*, that as defendant had introduced evidence of a conversation between plaintiff and his wife for the purpose of showing their voluntary separation, this entitled plaintiff, not by way of contradiction merely, but as independent rebutting testimony, to prove by another witness that in that conversation plaintiff declared that his wife's misconduct with defendant was the reason which induced him to this separation.)

If defendant has exhibited a model as evidence to meet plaintiff's testimony in chief that the machine in question would not work, plaintiff has a right in rebuttal to show by experts that a machine constructed according to the model would not work, although plaintiff denies the model's correctness. Hayward *v.* Draper, 85 *Mass.* (3 *Allen*), 551.

Where, upon the question whether the signature to a note sued upon was forged, the plaintiff puts in evidence two letters, with proof, not by experts, that they are in the maker's handwriting, and the defendant calls experts who testify the other way, it is in the discretion of the court to allow the plaintiff to call an expert to testify that, in his opinion, the signature is genuine. Costello *v.* Crowell, 133 *Mass.*, 352.

§ 653. *Allegation*.—Evidence may be legal, as rebutting testimony to repel a charge of fraud, which would have been inadmissible as original evidence, upon the ground of the variance between the allegations and the proof.

Zacharie *v.* Franklin, 12 *Pet. (U. S.)*, 151, 163; s. c., 9 *Law. ed.*, 1035, 1040 (admitting evidence of a prior gift, to rebut an attempt to impeach a bill of sale for fraud, etc.).

## RESCISSION.

§ 654. *Delay in rescinding*, is an election to affirm.

Strong *v.* Strong, 102 *N. Y.*, 69.

[In 14 *Abb. N. C.*, 301, will be found a note collecting the cases on Rescission of Contracts.]

REGULARITY.—[See also OFFICIAL ACT, and FORGOTTEN FACT.

§ 655. *Bank business*.—The presumption of regularity

applies, after the lapse of a considerable time, to sustain an inference that the duties of bank officers have been performed and business done in accordance with the custom and course of business of the bank.

*Knickerbocker Life Ins. Co. v. Pendleton*, 115 *U. S.*, 339, 344.

RESIDENCE.—[For kindred topics, see ABSENCE, DOMICIL, and FICTITIOUS PERSON.]

§ 656. What is.

657. Direct testimony.

658. General reputation.

659. Declarations and conduct.

660. Place of business.

661. Absence.

§ 662. Fugitive from justice.

663. Instrument executed out of the jurisdiction.

664. Deposition.

665. Presumption of continuance.

666. Burden of proof.

§ 656. *What is*.—The degree of fixity of abode requisite to constitute residence, varies according to the legal purpose for which the word is used.

*People v. Platt*, 46 *Hun (N. Y.)*, 394 (residence for purpose of qualification to hold office).

*Lee v. Boston*, 2 *Gray (Mass.)*, 484 (residence for purpose of mailing notice of protest).

*Borland v. Boston*, 132 *Mass.*, 89, 93, 95 (residence for purpose of taxation).

*Skinner v. Hall*, 69 *Cal.*, 195; s. c., 10 *Pacific Rep.*, 406 (sleeping alone in a house one night, *held*, sufficient evidence of residence for purpose of securing a homestead).

*Abb. Tr. Ev.*, 91 (residence for purpose of identification of one of several persons of the same name).

See also *Tazewell County v. Davenport*, 40 *Ill.*, 197; and *Frost v. Brisbin*, 19 *Wend. (N. Y.)*, 11, 13.

§ 657. *Direct testimony*.—A witness may testify to the fact of a person's residence; and even negatively, by showing that the witness had adequate acquaintance with the place, and that the person could not have lived there without the witness knowing it.

*Cavendish v. Troy*, 41 *Vt.*, 108.

[Compare NEGATIVE and FICTITIOUS PERSON.]

§ 658. *General reputation*.—Actual residence cannot be proved by reputation or family traditions.

*Londonderry v. Andover*, 28 *Vt.*, 416 (settlement of a pauper).

*Wheeler v. Webster*, 1 *E. D. Smith (N. Y.)*, 1.

*Pfister v. Dascey*, 68 *Cal.*, 572; s. c., 10 *Pacific Rep.*, 117 (homestead law).

S. P., ADDRESS (City Directory) and see *Fulham v. Howe*, 60 *Vt.*, 361; s. c., 6 *New Engl. Rep.*, 663; 14 *Atl. Rep.*, 652.

§ 659. *Declarations and conduct.*—Residence is determined by a consideration of acts and intention combined.<sup>1</sup> Hence, if the facts are not decisive, evidence of declarations and of conduct manifesting intent, is freely received.<sup>2</sup>

But declarations of intent, and acts relevant only for the purpose of manifesting intent, are not competent if the evidence as to abode is adequate and decisive to the contrary.<sup>3</sup>

<sup>1</sup> *Hindman's Appeal*, 85 *Pa. St.*, 466.

<sup>2</sup> *Abb. Tr. Ev.*, 107, 108.

*Follweiler v. Lutz*, 112 *Pa.*, 107; s. c., 2 *Atl. Rep.*, 721; s. c., less fully 2 *Central Rep.*, 535. (Testimony that county line passed through the house, lets in evidence that the occupant voted and took out license in one county, and not in the other; the question being in which county his assignment must be recorded.)

*Etna v. Brewer*, 78 *M.*, 377; s. c., 7 *Eastern Rep.*, 251. (Declarations as to intent in going to another town, competent on the question of settlement under the poor laws.)

Note in 75 *Am. Dec.*, 652, citing *Austin v. Swank*, 9 *Ind.*, 109 (declarations as to intent on leaving home, competent to show whether declarant was thereafter a resident householder within the rule as to levy of execution).

*Fulham v. Howe*, 60 *Vt.*, 351; s. c., 6 *New Engl. Rep.*, 663; 14 *Atl. Rep.*, 652. (Evidence of having voted in another state the laws of which are proved to have required a residence there of one year before voting, competent in action against tax-collector.)

*Pickering v. City of Cambridge*, 144 *Mass.*, 244; s. c., 10 *Northeast. Rep.*, 827.

§ 660. *Place of business.*—The fact of long continued business at a particular place is, in absence of evidence to the contrary, competent to raise the presumption of residence.<sup>1</sup> But a person having only a place of business here, and living in another state is a non-resident.<sup>2</sup>

<sup>1</sup> *Dederich v. McAllister*, 49 *How. Pr. (N. Y.)*, 35 (so held to show that the defendant resided out of the state, within the exception to the statute of limitations).



Otherwise of evidence as to one's mere intention to engage in business. *Fulham v. Howe*, 60 *Vt.*, 351; *s. c.*, 6 *New Engl. Rep.*, 663; 14 *Atl. Rep.*, 652.

<sup>2</sup> *Wallace v. Castle*, 68 *N. Y.*, 370 (so held to uphold an attachment, criticising *Towner v. Church*, 2 *Abb. Pr. (N. Y.)*, 299.)

§ 661. *Absence*.—Where there is no proof that a debtor had a domicile in the state, on proof of absence he will be deemed a non-resident.

*Harden v. Palmer*, 2 *E. D. Smith (N. Y.)*, 172, 178. (WOODRUFF, J., so held, to show defendant was within the exception of the statute of limitations.)

§ 662. *Fugitive from justice*.—The fact that a person convicted of a crime has escaped from the sheriff and remains concealed, raises a presumption that he has gone out of the state to remain, in order to place himself beyond the reach of the sheriff, and therefore tends to prove that he is a non-resident.

*Mayor etc. v. Genet*, 4 *Hun (N. Y.)*, 487; aff'd in 63 *N. Y.*, 646 (so held in order to sustain an attachment).

§ 663. *Instrument executed out of the jurisdiction*.—Where a contract is executed out of the state, the presumption is that the parties thereto are non-residents, and, in absence of evidence to the contrary, continue so.

*Mayor v. Friedman*, 7 *Hun (N. Y.)*, 218; aff'd, on this opinion, in 69 *N. Y.*, 608; holding that a defendant in a suit under such a contract, in order to avail himself of the statute of limitations, must show that he has been within the state for six years.

*S. P.*, *Fox v. Moyer*, 54 *N. Y.*, 125. (*Held*, that an execution, issued on a judgment in an action on a note, in the county where the note was made and sued upon, had been presumptively issued where the judgment debtor resided.)

*S. P.*, *Nichols v. Mase*, 94 *N. Y.*, 160, 166 (this principle was applied as sanctioning the presumption that chattels covered by a mortgage executed without the state were within the jurisdiction where the mortgage was executed).

*S. P.*, *Wilcox v. Hunt*, 13 *Pet. (U. S.)*, 378 (holding that under the law of Louisiana there is a like presumption as to a subscribing witness).

§ 664. *Deposition*.—Deponent presumed resident of place where he was examined, for purpose of letting in his deposition.<sup>1</sup>

And the certificate of the officer who took the deposition is sufficient to show *prima facie* the residence of the witness.<sup>2</sup>

<sup>1</sup> *People v. Hadden*, 3 *Den. (N. Y.)*, 220.

<sup>2</sup> *Patapsco Ins. Co. v. Southgate*, 5 *Pet. (U. S.)*, 602; s. c., 8 *Law. ed.*, 243.

§ 665. *Presumption of continuance*.—The fact of residence without the state at a given time raises a presumption, in absence of evidence to the contrary, that it continued thereafter.

*Nixon v. Palmer*, 10 *Barb. (N. Y.)*, 175. (The reversal in 8 *N. Y.*, 398, was wholly on another point.)

*S. P., Matter of Nichols*, 54 *N. Y.*, 62 (so held for the purposes of taxation).

*S. P., Rixford v. Miller*, 49 *Vt.*, 319. (Statute of limitations: proof that defendant resided in another state when the cause of action accrued, raised a presumption that he continued to reside there.)

§ 666. *Burden of proof*.—When the actual residence of a party is in question, slight evidence is enough to shift the burden of proof upon him as being a fact peculiarly within his own knowledge.

*Dederich v. McAllister*, 49 *How. Pr. (N. Y.)*, 351; mem. of s. c., 4 *Hun (N. Y.)*, 670.

## REVIVAL.

§ 667. *Allegation of succession*.—An order of court substituting a third person in the place of an original party, with the papers on which it is made, is conclusive evidence of succession and revival,<sup>1</sup> even without formal allegation in the pleadings;<sup>2</sup> unless the order requires further pleading.

The objection that the cause of action did not survive, or was not assignable, will still be available on the trial.<sup>3</sup>

<sup>1</sup> *Smith v. Zalinski*, 94 *N. Y.*, 519; aff'g 26 *Hun (N. Y.)*, 225 (order made on default).

*Smith v. Rathbun*, 22 *Hun (N. Y.)*, 150 (order, alleged by amendment of complaint, and not denied).

<sup>2</sup> *Lawrence v. Saratoga Lake R. W. Co.*, 36 *Hun (N. Y.)*, 467 (order made on stipulation admitting succession).

<sup>3</sup> *Arthur v. Griswold*, 60 *N. Y.*, 143.

*Contra*: *Underhill v. Crawford*, 29 *Barb. (N. Y.)*, 664; s. c., 18 *How. Pr. (N. Y.)*, 112 (where, however, on other grounds, motion for new trial was granted, after judgment for plaintiff on verdict).

## SATISFACTION.

§ 668. *Stipulation to satisfy*.—Under a contract for a thing to be done to the satisfaction of a party, evidence that performance was such as he *ought* in reason to be satisfied with is enough,<sup>1</sup> unless the object of the contract is to gratify taste, serve personal convenience or satisfy individual preference, in which case it is enough to show that he was not satisfied.<sup>2</sup> But it may be shown that he was satisfied, and that his expression of dissatisfaction was a pretence.<sup>3</sup>

<sup>1</sup> Duplex Safety Boiler Co. v. Garden, 101 N. Y., 387.

See note on this subject in 18 Abb. N. C., 48.

<sup>2</sup> *Id.*

Campbell Printing Press Co. v. Thorp, 36 Fed. Rep., 414; abstract s. c., 39 Alb. L. J., 135, 137.

<sup>3</sup> Baltimore & O. R. Co. v. Brydon, 65 Md., 198; s. c., 3 Atl. Rep., 306.

## SEALS.

§ 669. Material.

670. Judicial notice.

671. Direct testimony.

§ 672. Affixing.

673. One for several.

674. Record and omission.

§ 669. *Material*.—An impression directly on paper without wax, etc., satisfies the common law rule.

Pierce v. Indseth, 106 U. S., 546; s. c., 27 Law. ed., 254.

(The seal in this case was that of a foreign notary).

Hunt v. Hunt (N. J., 1887), 9 Atl. Rep., 690; s. c., 36 Abb. L. J., 44 (seal of court).

Pillow v. Roberts, 13 How. (U. S.), 99; s. c., 14 Law. ed., 228 (holding that the fact that a public officer in another state did not use wax in affixing a seal, was sufficient, in the absence of evidence to the contrary, to show that wax was not there required).

The traditional rule that wax or other adhesive substance is necessary has been superseded in most states by statutes allowing the impression to be on paper; but the New York statute expressly allowing official and judicial seals to be directly on paper (3 R. S., 5 ed., § 76, p. 687) has recently been amended by omitting judicial seal (N. Y. Code. Civ. Pro., § 960). By N. Y. L. 1848, p. 305, ch. 197, § 1; same stat., 3 R. S. (5 ed.), p. 687, § 77, a corporate seal may be directly on the paper.

But in New York a bit of paper affixed with mucilage satisfies the common law rule, even as a private seal. Gillespie v. Brooks, 2 Redf. (N. Y.), 349; Van Bokkelen v. Taylor, 62 N. Y., 105; rev'g 2 Hun (N. Y.), 138; s. c., 4 N. Y. Supm. Ct. (T. & C.), 425 (revenue stamp so used).

“In all cases where a seal is necessary by law to any commission, process or other instrument provided for by the *laws of Congress*, it shall be lawful to affix the proper seal by making an impression therewith directly on the paper to which such seal is necessary; which shall be as valid as if made on wax or other adhesive substance.” *U. S. R. S.*, § 6.

§ 670. *Judicial notice*.—The court will take judicial notice of the seals of notaries public, even in foreign countries, for they are officers recognized by the commercial law of the world.

*Pierce v. Indseth*, 106 *U. S.*, 546; s. c., 27 *Law. ed.*, 254.  
*The Gallego*, 30 *Fed. Rep.*, 271.

§ 671. *Direct testimony*.—Any witness familiar with the device of a corporate, or other peculiar seal may testify to its identity. But testimony of a witness that he had been told by corporate officers, etc., that it was the seal, is not enough.

*Abb. Tr. Ev.*, 35.

*Susquehanna, B. & B. Co. v. General Ins. Co.*, 3 *Md.*, 305; s. c., 56 *Am. Dec.*, 740, with note. (*Held*, affirming judgment, that proof of the seal of a corporation is unnecessary, when it is shown to have been affixed by the proper officer or agent of the company; as here, to a mortgage to secure a debt of the company).

Evidence that neither the officer who signed nor the custodian of the seal had knowledge of its being affixed, casts the burden on the holder of the instrument to prove that it was affixed rightfully. *Koehler v. Black River Falls Iron Co.*, 2 *Black. (U. S.)*, 715; s. c., 17 *Law. ed.*, 340.

§ 672. *Affixing*.—Delivery without a seal, although the instrument is expressed to be attested by “my hand and seal,” does not imply authority to affix a seal.

*Metropolitan Life Ins. Co. v. McCoy*, 41 *Hun (N. Y.)*, 142.

But the statement raises a presumption that the party affixed the seal. *Hammond v. Gordon*, 93 *Mo.*, 223; s. c., 11 *Western Rep.*, 904; 6 *Southwest. Rep.*, 93. The presumption is the same in the absence of any mention of the mode of authentication, *Abb. Tr. Ev.*, 392. Otherwise if signing is mentioned, and sealing is not. *Id.*

§ 673. *One for several*.—To invoke the rule that one seal

will do for several signers,<sup>1</sup> there must be evidence that they authorized it or intended to adopt it.<sup>2</sup>

<sup>1</sup> *Ludlow v. Simond*, 2 *Cai. Cas. (N. Y.)*, 1, 7, 42, 55.

<sup>2</sup> *Citizens Bldg. Asso. v. Cummings (Ohio, 1888)*, 14 *Western Rep.*, 533; s. c., 16 *Northeast. Rep.*, 841.

*Van Alstyne v. Van Slyck*, 10 *Barb. (N. Y.)*, 383.

*Parr v. Village of Greenbush*, 42 *Hun (N. Y.)*, 232 (holding seals affixed after signatures by the trustees a good seal of the village if it had no peculiar seal).

The intent may be shown by any evidence competent to show intent.

*Atlantic Dock Co. v. Leavitt*, 54 *N. Y.*, 35; s. c., 13 *Am. Rep.*, 566, aff'g 50 *Barb. (N. Y.)*, 135.

§ 674. *Record and omission*.—Seal provable by record.<sup>1</sup>  
Omission from record how supplied in evidence.<sup>2</sup>

<sup>1</sup> *Follett v. Rose*, 3 *McLean (C. C.)*, 332; *Gillespie v. Reed, Id.*, 377; *Abb. Tr. Ev.*, 506.

<sup>2</sup> *Todd v. Union Dime Sav'gs Bk.*, 20 *Abb. N. C.*, 270.  
*Campbell v. Laclede Gas Light Co. Bk.*, 30 *Law. ed. (U. S.)*, 459.

SEASON.—[For kindred topics, see SUN, MOON and WEATHER.]

§ 675. *Judicial notice*.—The court may take notice of the season at which a crop should mature.

*Floyd v. Ricks*, 14 *Ark.*, 286, 292; s. c., 58 *Am. Dec.*, 374 (*dictum*).

*Contra* of crops in another county, *Dixon v. Nicolls*, 39 *Ill.*, 372; and of the time when the pasturing season closes. *Gove v. Downer*, 59 *Vt.*, 139; s. c., 3 *New Engl. Rep.*, 463.

SEPARATION.—[For kindred topics, see ABSENCE, and DESERTION.]

§ 676. *Competency of testimony of husband and wife*.—When a wife is competent to testify to the fact of separation and has done so, she is competent to testify to conversation had at the time between herself and husband as part of the *res gestæ*, to show the ground then assigned for it.

*Baker v. Baker*, 15 *Abb. N. C.*, 293.

SERVICE.

§ 677. *Affidavits not competent*.—The service of a notice

when required to be proved on a trial, must be proved by common law evidence; and affidavits are not competent, unless made so by some statute.

People *ex rel. Vogler v. Walsh*, 86 N. Y., 481.

Affidavit competent when the affiant is dead or insane, or his personal attendance cannot be compelled, with due diligence. N. Y. Code Civ. Pro., § 927.

**SIGNATURE.**—[For kindred topics, see **HANDWRITING, MARK, GENUINENESS, AGENCY, NAME, and IDENTITY.**]

§ 678. Document produced on notice. § 680. Oral evidence.

679. Authority to sign.

§ 678. *Document produced on notice.*—When one party pursuant to notice, produces an instrument to which he is a party, and under which he claims a beneficial interest, the other party need not, before putting it in evidence, prove the signatures thereto, or call the subscribing witnesses for that purpose.

*White v. Miller*, 7 Hun (N. Y.), 427 (rev'd on other grounds, in 71 N. Y., 118).

§ 679. *Authority to sign.*—In a conflict of evidence as to whether a person was authorized to sign the name of another, evidence of the previous declarations of the latter manifesting his intent, is competent.

*Thompson v. First Nat. Bank of Toledo*, 111 U. S., 529; 28 Law. ed., 507.

*Woodcock v. Johnson*, 36 Minn., 217; s. c., 30 Northwest. Rep., 894.

§ 680. *Oral evidence* competent to show that a party signing was,<sup>1</sup> or was not,<sup>2</sup> to be liable personally in a particular character; or that one signing for principals did so on his own behalf as well.

<sup>1</sup> *Young v. Schuler*, L. R. 11 Q. B. D., 651; s. c., 49 L. T. R. (N. S.), 546.

<sup>2</sup> *Schmittler v. Simon* (N. Y., 1889), 21 Northeast. Rep., 162.

But compare, *Abb. Tr. Ev.*, 298–301.

**SIGNS AND SIGNALS.**—[For kindred topics, see **CONVERSATION, FEELINGS, INTENT, and NEGATIVE.**]

§ 681. *Understanding of witness.*—A witness cannot tes-

tify to his understanding of what another person meant by signs such as a nod, when it amounts only to the opinion of the witness, and not to a statement of fact.

*Rollwagen v. Rollwagen*, 3 *Hun* (N. Y.), 121; s. c., 5 *N. Y. Supm. Ct. (T. & C.)*, 402; aff'g 48 *How. Pr.* (N. Y.), 289; aff'd in 63 *N. Y.*, 504 (without discussing this question. Motions of testator in executing will). [But see: *Messner v. People*, 45 *N. Y.*, 1 (holding that a witness cannot testify to significance of outcry).]

## SITUS.

§ 682. *Debts*.—As to situs of debts, see note in 19 *Abb. N. C.*, 403.

SPEED.—[For kindred topics, see TIME, DISTANCE, and QUANTITY.]

§ 683. Direct testimony.

§ 685. Declarations as part of the *res gestæ*.

684. Comparison by combining witnesses.

§ 683. *Direct testimony*.—A witness of ordinary experience on the subject may testify directly to the speed of a railroad train.

*Salter v. Utica etc. R. R. Co.*, 59 *N. Y.*, 631; rev'g 2 *N. Y. Supm. Ct. (T. & C.)*, 800.

*Guggenheim v. Lake Shore etc. R. Co.* (*Mich.*, 1887), 9 *Western Rep.*, 907; s. c., 33 *Northwest. Rep.*, 161.

*Hoppe v. Chicago etc. R. R.*, 61 *Wisc.*, 357.

§ 684. *Comparison by combining witnesses*.—To show speed at a given place, evidence of speed within a reasonable distance, and that it was unchecked meanwhile, is competent.

*Louisville, New Albany etc. R. Co. v. Jones*, 108 *Ind.*, 55; s. c., 7 *Western Rep.*, 33.

For other illustrations of this principle, see FORGOTTEN FACT, QUANTITY and QUALITY.

§ 685. *Declarations as part of the res gestæ*.—Declarations of an engineer of a railroad train, stating the speed at which the train was running at time of the disaster, made not at the time and as part of the accident, but afterwards and independently (however brief the time intervening), are not competent evidence as part of the *res gestæ*.

*Vicksburg & Meridian R. R. v. O'Brien*, 119 *U. S.*, 99; s. c., 30 *Law. ed.*, 299; 6 *Sup. Ct. Rep.*, 118 (collecting cases on the *res gestæ* of an accident).

## STATUS.

§ 686. *Competency of judgment*, against one not a party.

Eisenlord *v.* Eisenlord, 49 *Hun* (N. Y.), 340 (judgment in crim. con. competent against offspring).

Wottrich *v.* Freeman, 71 *N. Y.*, 601 (judgment in divorce, competent in crim. con.).

Davis *v.* Wood, 1 *Wheat.*<sup>1</sup> (U. S.), 6; s. c., 4 *Law. ed.*, 22 (freedom).

## SUNRISE AND SUNSET.

§ 687. *An almanac* may be used to ascertain the time at which the sun rose or set at a specified date.

The controversy is as to whether it is evidence, as held in *Munchower v. State*, 55 *Md.*, 11; s. c., 39 *Am. Rep.*, 414, or only the means of refreshing the knowledge of the court or jury as held in *Case v. Perew*, 46 *Hun* (N. Y.), 57; and *People v. Chee Kee*, 61 *Cal.*, 404; cited in 59 *Am. Dec.*, 185 *n.*, 186 *n.*, holding it therefore no error to exclude formal proof.

## SURETYSHIP.

§ 688. *Oral evidence*.—As between the parties who are apparently either principals or sureties, the question of suretyship in a written instrument is open to parol proof.

*Abb. Tr. Ev.*, 254.

*Preston v. Gould*, 64 *Iowa*, 44; s. c., 19 *Northwest. Rep.*, 834.

SURPRISE.—[See cases, on surprise at the trial, collected in note in 14 *Abb. N. C.*, 469.]

§ 689. *Right to object*.—Counsel have a right to rely upon the adversary's pleading as indicating the case he is to meet; and recovery upon proof of a somewhat different cause of action or defense cannot be sustained by amending or disregarding the variance against objection, unless the objector is allowed adequate opportunity to amend also if necessary, and to meet the amended allegations against him by proof.<sup>1</sup>

The right to require proof that the objector has been misled is waived if not claimed at the trial.<sup>2</sup>

<sup>1</sup> *Romeyn v. Sickels*, 108 *N. Y.*, 650.

<sup>2</sup> *Griggs v. Howe*, 2 *Abb. Ct. App. Dec.* (N. Y.), 291; 31 *Barb.* (N. Y.), 100.



SURRENDER.—[For kindred topics, see ABANDONMENT, CLAIM, ASSIGNMENT, DELIVERY, and POSSESSION.]

§ 690. Verbal.

§ 691. Payment as raising presumption.

§ 690. *Verbal*.—Express oral consent to the retaking of possession of land, though not given on the land, is, if followed by retaking and continuance of possession, without objection, equivalent to actual or symbolic surrender.

Baumier v. Antiau (*Mich.*, 1887), 8 *Western Rep.*, 115.

§ 691. *Payment as raising presumption*.—Evidence that an obligation has been paid raises a legal presumption that it was surrendered, if it be one which the debtor had a right to require surrender of, as his voucher, otherwise not.

Lyman v. Bank of United States, 12 *How. (U. S.)*, 225; s. c., 13 *Law. ed.*, 965 (promissory notes).

## TAMPERING.

§ 692. *Contradiction*.—On a question of tampering one may contradict an answer given by his own witness on the adversary's cross-examination; or an answer given by the adversary's witness on one's own cross.<sup>2</sup>

<sup>1</sup> Comstock v. Handy, 23 *N. Y. Weekly Dig.*, 547.

<sup>2</sup> Lewis v. Steiger, 68 *Cal.*, 200; s. c., 8 *Pacific Rep.*, 884.

TELEGRAMS.—[For kindred topics, see LETTERS, and MESSAGE.]

§ 693. Not privileged.

§ 695. — of authority.

694. Best and secondary evidence of contents.

696. Presumption of delivery.

697. Connected correspondence.

§ 693. *Not privileged*.—Telegrams are not privileged or confidential communications. The agent or operator of the company may be compelled to produce them by *subpœna duces tecum*;<sup>1</sup> and, if the absence of the paper is accounted for, may give oral evidence of contents.<sup>2</sup>

<sup>1</sup> *Exp. Brown*, 72 *Mo.*, 83.

<sup>2</sup> *State v. Litchfield*, 58 *Me.*, 267.

§ 694. *Best and secondary evidence of contents*.—In general, where the course of communication is such that the message *as delivered to the telegraph company* binds either party, that paper is primary evidence as against such party.

Where such, that the message *as received* binds either party, that paper is primary evidence, as against him.<sup>1</sup>

<sup>1</sup> Oregon Steamship Co. v. Otis, 27 *Hun*, 452; s. c., 14 *Abb. N. C.*, 388, 394, with note and cases there collected on all the various aspects of offering telegrams as evidence. The case was affirmed in 100 *N. Y.*, 446.

In Anheuser-Busch Brewing Asso. v. Hutmacher (*Ill.*, 1889), the rule is well stated thus: When the person to whom a telegram is sent takes the risk of its transmission, or is the employer of the telegraph company, the message delivered to the operator is the original and must be produced as the best evidence; but when the person sending the message takes the initiative, so that the telegraph company is to be regarded as his agent, the original is the message actually delivered at the end of the line, and that is primary evidence of the contents of the message sent.

§ 695. — *of authority to send.*—In either case there must be preliminary evidence of the agency of the company transmitting the message: and of this fact the original itself in his handwriting or that of his agent is the primary evidence.<sup>1</sup> If its absence is accounted for, indirect evidence of authority or ratification is enough.<sup>2</sup>

<sup>1</sup> Oregon Steamship Co. v. Otis, 100 *N. Y.*, 446.

Culver v. Warren (*Kans.*, 1887), 13 *Pacif. Rep.*, 577.

Testimony to establish the contents of a telegram should not be admitted, in the absence of evidence showing its loss or destruction. Prather v. Wilkens, 68 *Tex.*, 187; s. c., 4 *Southwest. Rep.*, 252.

<sup>2</sup> Oregon Steamship Co. v. Otis, *above cited* (holding that omission to reply to a letter reciting the telegram sent, and dealings in compliance with other telegrams of the same series, were enough as against a party who, when examined as a witness, did not deny having sent the telegrams).

Culver v. Warren (*Kan.*, 1887), 13 *Pacific Rep.*, 517 (holding part payment of the demand arising out of the transaction, sufficient evidence of agency of the company).

§ 696. *Presumption of delivery.*—Where a message to be transmitted by telegraph is shown to have been delivered to the operator and it is proved by such operator at the telegraph office that all messages received were duly transmitted, there is a presumption arising from the regular

course of business, that the message was received by the person to whom it was sent.

Comm. v. Jeffries, 89 *Mass.*, 548, 563 (criminal case; false pretenses).

Upon proof of delivery of a telegraphic message for transmission, the presumption arises that the message reached its destination. *Oregon Steamship Co. v. Otis*, 100 *N. Y.*, 446: s. c., 1 *Central Rep.*, 734 (civil case).

§ 697. *Connected correspondence*.—Relevant letters and telegrams which the party on testifying as a witness does not deny that he received or sent, may be received if they are a connected part of a correspondence otherwise already in evidence.

*Oregon Steamship Co. v. Otis* (*above cited*).

TELEPHONE.—[For kindred topics, see ADMISSIONS, CONVERSATION, and MESSAGE.]

§ 698. Recognition of speaker.  
699. Other evidence of identity.

§ 700. Presumption of authority.  
701. Agency of operator.

§ 698. *Recognition of speaker*.—The receiver or hearer of a message through the telephone, may testify to the identity of the person speaking through the instrument, if he had had previous conversations with him through the instrument and otherwise, and at the time of the conversation in question recognized his voice through the instrument.

*People v. Ward*, 3 *N. Y. Crim. R.*, 483, 511, BARRETT, J. (This decision has been criticised, 28 *Alb. L. J.*, 422; 28 *Centr. L. J.*, 362; but in view of the previous conversance with the voice, the competency of the evidence is analogous to that of the testimony to handwriting received from one who has corresponded with the alleged writer, or received letters from him.)

§ 699. *Other evidence of identity*.—The identity of a speaker may be proved by other evidence than the testimony of the one whom he addressed through the telephone.

*Davis v. Walter*, 70 *Iowa*, 465.

§ 700. *Presumption of authority*.—If a person or corporation has a telephone instrument in his place of business, the response received through it, to a communication ad-

ressed to him is competent against him without evidence to identify the speaker.

*Wolfe v. Missouri Pacif. Ry. Co.* (Mo., 1889), abstr. 17 *Wash. L. Rep.*, 309.

*Reed v. Burlington, C. R. & N. R. Co.*, 72 *Iowa*, 166; s. c., 33 *Northwest. Rep.*, 451.

For the same principle, see § 102, AGENCY.

[As to what evidence there should be of being in communication with his office, *query* ?]

§ 701. *Agency of operator*.—If it be shown that the person serving as operator at the telephone was requested or authorized by the speaker to act for him in speaking through the instrument, or in hearing the message through the instrument and repeating it to the receiver, he may be regarded as the agent of the speaker, and his interpretation of the message to the receiver binds the speaker, and may be proved by any witness who heard it.

*Sullivan v. Kuykendall*, 82 *Ky.*, 483; s. c., 56 *Am. R.*, 901; 24 *Am. L. Reg.*, 442. This decision has been criticised, 22 *Centr. L. J.*, 34. But if questionable in any point it is as to assuming that the operator was the agent of the speaker rather than of the receiver in that case.

## TENDER.

§ 702. Actual production.

703. Offer and readiness.

§ 704. Having in sight.

§ 702. *Actual production of money necessary*.<sup>1</sup> An offer to pay is not the equivalent of a tender.<sup>2</sup>

<sup>1</sup> *Strong v. Blake*, 46 *Barb.* (N. Y.), 227, 228 (holding that it was not enough for the debtor to have the money in his pocket).

*Bakeman v. Pooler*, 15 *Wend.* (N. Y.), 637.

<sup>2</sup> *Lewis v. Mott*, 36 *N. Y.*, 395, 402.

§ 703. *Offer and readiness to pay by check to be certified*, sufficient against a party who without intimating that he would deliver on payment departs and does not return.

*Currie v. White*, 45 *N. Y.*, 822, 830.

§ 704. *Having in sight enough*, if there is a practical refusal to receive.

*Lawrence v. Miller*, 86 *N. Y.*, 137 (deed).

TESTIMONY (GIVEN IN FORMER PROCEEDINGS).—[See the rules fully stated in *Criminal Brief*, 398, etc., § 659, etc., and in 14 *Abb. N. C.*, 421.]

THREATS.—[See also CONVERSATION, LETTERS, HANDWRITING.]

§ 705. *An allegation* of threatening may be proved by acts as well as by words.

*People v. Deacons*, 109 *N. Y.*, 374 (so holding on indictment under statute, punishing “any tramp who . . . shall threaten to do injury to any person.”) *S. P.*, *Criminal Brief*, 409, § 677. Ambiguity does not render threat incompetent; *Id.*, 409, § 675.

TIDE.—[For kindred topics, see MOON, and NAVIGABILITY.]

§ 706. Judicial notice.

§ 707. Flow.

§ 706. *Judicial notice*.—The court may take judicial notice whether the tide ebbs and flows at a given place.

*Peyroux v. Howard*, 7 *Pet. (U. S.)*, 324, 342.

Tide tables calculated by scientific authors, *e. g.*, Blunt’s *Coast Pilot*, and Bowditch’s *Navigator*, may be read in evidence to prove the situation of the tide at a particular time. (*Mayor’s Ct.*, 1316), *Green v. Cornwell*, 1 *N. Y. City H. Rec.*, 11. See also JUDICIAL NOTICE.

§ 707. *Flow*.—It is not necessary to show a backward current. It is enough that there is a regular rise and fall.

*Peyroux v. Howard*, 7 *Pet. (U. S.)*, 324, 343.

## TIME AND DISTANCE.

§ 708. Judicial notice.

709. — of express transit.

710. Direct testimony to time spent.

711. Comparison.

712. Opinion.

§ 713. — time to get off train.

714. — time necessary for specified distance.

715. — for specified work.

716. Entries and records.

§ 708. *Judicial notice*.—The court should take judicial notice of distance between public places of which it may take judicial notice, even when the question involves only a matter of private right.

*Hoyt v. Russell*, 117 *U. S.*, 401; *s. c.*, 29 *Law. ed.*, 914 (so held, where the object was to ascertain if a new statute had by its terms come into force at that distance).

*Hinckley v. Beckwith*, 23 *Wisc.*, 328 (distance of residence of witness from place of trial).

§ 709. — *of express transit.*—The court are not bound to take judicial notice of the reasonable time necessary for transportation of express matter from one well known city to another.

Rice v. Montgomery, 4 Biss. (C. C.), 75.  
Otherwise of the *MAILS*, see § 208, *MAILS*.

§ 710. *Direct testimony to time spent.*—The question what portion of another person's time was spent in a given service, is one of fact to which a witness having had adequate opportunities of observation may testify directly.

Johnson v. Myers, 103 N. Y., 663 (what portion of his time witness' husband had spent in his employer's business).

§ 711. *Comparison.*—In the absence of better evidence, or in case of conflict of testimony as to a period of time, it is competent to prove facts otherwise irrelevant, that occupied the same time, and when they occurred.

Sias v. Munroe, 134 Mass., 153. (Period during which a dealer served a customer, proved by evidence of his simultaneous service of another.) *S. P.*, *FORGOTTEN FACT*.

§ 712. *Opinion.*—How far a certain light can be seen on the water under given circumstances is a proper subject for the opinion of a mariner conversant with the place.

Case v. Perew, 46 Hun (N. Y.), 57.

But see McKerchnie v. Standish, 6 N. Y. Weekly Dig., 433 (opinion of an astronomical expert as to how far a vessel could be seen on a certain day and hour, if there were no obstruction,—*Held*, mere speculation; and doubt expressed as to its competency even in the absence of all other proof.)

§ 713. — *time to get off train.*—An expert cannot be asked his opinion whether the time during which a railroad train stopped was sufficient to enable the passengers to get off.

Keller v. N. Y. Central R. R. Co., 2 Abb. (N. Y.) Ct. App. Dec., 480. Approved in Milwaukee & St. P. Ry. Co. v. Kellogg, 94 U. S., 469, 473; Stowe v. Bishop, 58 Vt., 498; s. c., 2 New Engl. Rep., 109.

*Contra*: of an eye witness. Quinn v. N. Y. New Haven & H. R. Co., 56 Conn., 44; s. c., 5 New Engl. Rep., 685; 12 Atl. Rep., 97 (question whether one had time to jump from a hand car, allowed).

But see, *Burrows v. Erie Ry. Co.*, 3 *N. Y. Supm. Ct. (T. & C.)*, 44; rev'd in 63 *N. Y.*, 566.

§ 714. — *time necessary for specified distance.*—When the time necessary for passing from one point to another is material, a witness who has passed over the ground under similar conditions may testify to the result of his experiment.

*People v. Kelly*, 35 *Hun (N. Y.)*, 295.

*State v. Flint*, 60 *Vt.*, 304; s. c., 6 *New Engl. Rep.*, 529; 14 *Atl. Rep.*, 178.

But the details of the conditions may be essential. *Klanowski v. Grand Trunk R. R. Co. (Mich.)*, 1887, 7 *Western Rep.*, 600, 602 (court divided on this question).

Opinion or direct testimony as to the distance to which fire would "jump," and the time sparks would remain alive, competent; see *Davidson v. St. Paul etc. R. R. Co.*, 35 *Minn.*, 57; abst. s. c., 32 *Alb. L. J.*, 379.

§ 715. — *for specified work.*—An expert may testify to the time necessary for a given operation.

*McDonald v. Barton*, 1 *N. Y. Supm. Ct. (T. & C.)*, *add.*, 12 (building stairs).

*Hadden v. Houghtaling*, 1 *Hun (N. Y.)*, 318.

*Smith v. Gugerty*, 4 *Barb. (N. Y.)*, 614 (time required, in opinion of mason, for walls to dry).

*Compare. Payne v. Hodge*, 7 *Hun (N. Y.)*, 612; aff'd in 71 *N. Y.*, 598 (without opinion).

*Emerson v. Lowell, G. L. Co.*, 85 *Mass. (3 Allen)*, 410.

§ 716. *Entries and records.*—As between third persons, entries in the ordinary course of business, such as the record of the time of passing trains, are not made evidence of the time, merely by proving the custom to keep the record. The testimony of the persons who reported the fact, and thereupon made the entry should be produced or accounted for.

*Graville v. N. Y. Central etc. R. R. Co.*, 34 *Hun (N. Y.)*, 224, reviewing cases. Compare FORGOTTEN FACT.

TITLE.—[See also ACCEPTANCE, ASSIGNMENT, DELIVERY and POSSESSION. As to *Personal property*, see OWNERSHIP.

§ 717. Direct testimony.

718. General reputation.

719. Possession.

720. Conveyance by one in possession.

§ 721. Deed founded on judicial proceedings.

722. Assessment roll.

723. Oral evidence.

724. Marketableness. Opinion.

725. Refusal of others to pass.

§ 717. *Direct testimony*.—When title is only incidentally involved, a witness may testify directly as to who is or was owner.<sup>1</sup>

Otherwise when directly involved in the issue.<sup>2</sup>

<sup>1</sup> Potter v. Weidman, 20 *N. Y. Weekly Dig.*, 110.

<sup>2</sup> Jordan v. McKinney, 144 *Mass.*, 438; s. c., 4 *New Engl. Rep.*, 426.

§ 718. *General reputation* not competent.

Green v. Chelsea, 41 *Mass.* (24 *Pick.*), 71.

Canfield v. Hard, 58 *Vt.*, 217; s. c., 3 *Eastern Rep.*, 461.

§ 719. *Possession*.—Actual possession raises presumption of title;<sup>1</sup> and as against a trespasser this is sufficient.<sup>2</sup>

Otherwise of occasional entering on vacant land.<sup>3</sup>

<sup>1</sup> Miller v. Long Island R. R. Co., 71 *N. Y.*, 380; rev'g 9 *Hun* (N. Y.), 194 (civil case).

White v. State, 14 *Tex. App.*, 449 (criminal case).

Harland v. Eastman, 119 *Ill.*, 22; s. c., 7 *Northeast Rep.*, 59 (ejectment).

And actual possession of a part of farm lands accompanied by constructive possession of abutting lands included in the description of a deed, raises a presumption of ownership of all the land described in the deed.  
Burk v. Spinning, 2 *N. Y. State Rep.*, 221.

<sup>2</sup> Burt v. Panjaud, 99 *U. S.*, 180; s. c., 25 *Law. ed.*, 451.  
Campbell v. Rankin, *Id.*, 261; s. c., 25 *Law. ed.*, 435.

<sup>3</sup> Miller v. Long Island R. R. Co. (*above cited*).

§ 720. *Conveyance by one in possession*.—A conveyance is competent as evidence of title in the grantee, if it be shown that the grantor was in possession.<sup>1</sup> Otherwise it is not alone evidence of title.<sup>2</sup>

<sup>1</sup> Doherty v. Matsell, 11 *N. Y. Civ. Pro. R.* (*Browne*), 392, and cas. cit.; s. c., 54 *N. Y. Super. Ct. (J. & S.)*, 17.

<sup>2</sup> Miller v. Long Island R. R. Co., 71 *N. Y.*, 380; rev'g 9 *Hun* (N. Y.), 194.

Forsyth v. Rickenbrode, 22 *N. Y. Weekly Dig.*, 470.  
Title to land by deed, how proved, *Abb. Tr. Ev.*, 693.

§ 721. *Deed founded on judicial proceedings*, not competent without proof of those proceedings.

Reed v. Ohio & M. R. Co. (*Ill.*), 15 *Western Rep.*, 190; s. c., 17 *Northeast. Rep.*, 807 (master's deed to successor of corporation).



Hasbrouck v. Burhans, 47 *Hun* (N. Y.), 487. (Sheriff's deed, without execution, etc., saved from this rule by being ancient deed aided by evidence of declarations of party.)

Title under sheriff's sale, how proved. *Abb. Tr. Ev.*, 702.

As to proving *Lost records*, see note in 21 *Abb. N. C.*, 367, collecting cases.

Dawson v. Parham, 47 *Ark.*, 215; s. c., 1 *Southwest. Rep.*, 73.

Tucker v. Murphy, 66 *Tex.*, 355; s. c., 1 *Southwest. Rep.*, 76 (administrator's deed).

By a deed, made by one competent to convey in his own right, and made in proper form for that purpose, is effective, notwithstanding it recites judicial proceedings as its occasion, and they are not proved. *Rockwell v. McGovern*, 69 *N. Y.*, 294; aff'g 40 *N. Y. Super. Ct. (J. & S.)*, 118 (assignment in insolvency).

§ 722. *Assessment roll* not alone competent as tending to show title.

*Shumway v. Leakey*, 67 *Cal.*, 458; s. c., 8 *Pacif. Rep.* 12; but see query in *Doe v. Arkwright*, 2 *Adol. & El.* 182, n.

§ 723. *Oral evidence*.—Title to land, not to be proved or disproved merely by oral admission.

*Abb. Tr. Ev.*, 710.

See also, § 70, ADMISSIONS.

Oral evidence—in what cases competent to supply defects in title. Note in 22 *Abb. N. C.*, 397-422.

§ 724. *Marketableness—opinion*.—The opinion of counsel as to whether a title is marketable,<sup>1</sup> is not competent evidence on a question between vendor and purchaser.<sup>2</sup>

<sup>1</sup> For the rule as to doubtful or bad title, see note in 22 *Abb. N. C.*, 397, collecting cases.

<sup>2</sup> *Murray v. Ellis*, 112 *Pa.*, 485; s. c., 3 *Centr. Rep.*, 150; s. c., 7 *Eastern Rep.*, 683.

*Stiles v. Steele*, 37 *Kans.*, 552; s. c., 15 *Pacific Rep.*, 561.

*Moser v. Cochrane*, 107 *N. Y.*, 35; s. c., 9 *Centr. Rep.*, 427; 13 *Northeast. Rep.*, 442.

§ 725. *Refusal of others to pass*.—The refusal of others to take the title, or to make a loan upon it, is not competent.

*Moser v. Cochrane* (above cited).

## TREATMENT.

§ 726. *Direct testimony*.—When the manner of one person's treatment of another is involved in the issue, a witness having adequate opportunity of examination may testify as to whether it was kindly or not.

Baldwin *v.* Parker, 99 *Mass.*, 79 (in this case a party was allowed to testify that her own treatment of children was kind). See also FEELING.

[For other kinds of evidence see Cowley *v.* People, 83 *N. Y.*, 464; s. c., 38 *Am. Rep.*, 464, with note; 8 *Abb. N. C.*, 1.]

USAGE.—[For kindred topics, see ABBREVIATIONS, ANTIQUITIES, AGENCY, BUSINESS, NEGATIVE, and FORGOTTEN FACT.

§ 727. When competent.

727a. To control meaning.

728. Not competent to create contract.

729. Judicial notice.

730. Direct testimony.

§ 731. Single witness.

732. Single cases.<sup>1</sup>

733. Foreign law.

734. Presumption of knowledge.

735. Testimony as to knowledge.

§ 727. *When competent*.—In the interpretation of a contract, a uniform, continuous, and well-settled usage pertaining to its subject may be proved, if not opposed to the law, and not unreasonable.<sup>1</sup>

But usage cannot be proved to contradict a rule of law;<sup>2</sup> or contradict unambiguous terms in the contract;<sup>3</sup> or its legal effect.<sup>4</sup>

<sup>1</sup> Walls *v.* Bailey, 49 *N. Y.*, 464; s. c., 10 *Am. R.*, 407.

Barnard *v.* Kellogg, 10 *Wall. (U. S.)*, 383.

Fuller *v.* Robinson, 86 *N. Y.*, 306; s. c., 40 *Am. R.*, 540.

For the general rule and its exceptions, see 1 *Abb. N. C.*, 470, note, and *Abb. Tr. Ev.*, 296.

<sup>2</sup> Corn Exchange Bank *v.* Nassau Bank, 91 *N. Y.*, 74, and cas. cit.

Svendsen *v.* Wallace, *L. R.* 11 *Q. B. Div.*, 616; s. c., 46 *L. T. R. (N. S.)*, 742; 30 *Weekly Rep.*, 841 (holding mercantile acquiescence in the practice of average adjusters to disregard a decision of the courts, not a valid usage).

<sup>3</sup> Farmers' & Mech. Nat. Bk. of Buffalo *v.* Logan, 74 *N. Y.*, 568.

<sup>4</sup> Barnard *v.* Kellogg, 10 *Wall.*, 383.

Van Hoesen *v.* Cameron, 54 *Mich.*, 609; s. c., 20 *Northwest. Rep.*, 609

§ 727a. *To control meaning.*—Usage of language may be proved to show the meaning of words otherwise unambiguous.<sup>1</sup>

But to control the ordinary meaning of words used in a contract, by proof of a usage of a particular trade or profession giving them a technical meaning, the evidence must show usage uniform, continuous and well settled, so that it can be inferred that the parties contracted with a knowledge of and reference to it.<sup>2</sup>

<sup>1</sup> *Myers v. Sarl*, 30 *L. J. Q. B.*, 9; s. c., 7 *Jur. N. S.*, 97.

<sup>2</sup> *Miller v. Burke*, 68 *N. Y.*, 615; aff'g 6 *Daly (N. Y.)*, 171.

§ 728. *Not competent to create contract.*—Evidence of usage or custom is not competent to show a contract liability, unless there is some other evidence of the existence of a contract.

*Tilley v. County of Cook*, 103 *U. S.*, 155; s. c., 36 *Law. ed.*, 374.

§ 729. *Judicial notice taken* — of usual stock in trade.

*Steinbeck v. Lafayette Fire Ins. Co.*, 54 *N. Y.*, 90.

*Contra: Whitmarsh v. Charter Oak F. Ins. Co.*, 84 *Mass.* (2 *Allen*), 581.

Not taken of local custom in municipal affairs. *Matter of Walter*, 75 *N. Y.*, 354.

§ 730. *Direct testimony.*—Any witness, though not an expert in the particular business, is competent to testify to usage if he knows the usage.<sup>1</sup>

But testimony, even of experts, to what is proper, etc., is unavailing. There must be testimony to the existence of a usage.<sup>2</sup>

<sup>1</sup> *Griffin v. Rice*, 1 *Hill. (N. Y.)*, 184.

<sup>2</sup> *Marine Natl. Bk. v. National City Bk.*, 59 *N. Y.*, 67, 74; s. c., 17 *Am. Rep.*, 305, with note, rev'g 36 *N. Y.*, *Super. Ct. (J. & S.)*, 470.

*Oelrichs v. Ford*, 23 *How. (U. S.)*, 49.

*Gallup v. Lederer*, 1 *Hun (N. Y.)*, 282; s. c., 3 *N. Y. Supm. Ct. (T. & C.)*, 710. See also *Abb. Tr. Ev.*, 486.

Opinions of witnesses are incompetent to prove that a usage exists, if it be shown by their testimony that such opinions were deduced from the fact that they never knew a case where a right was asserted contrary to the alleged usage, and that such usage

would be necessary for the protection of a class of dealers. *Willis v. Tibbals*, 33 *N. Y. Super. Ct. (J. & S.)*, 220.

But where the ultimate question is one of care or negligence, and usage is only relevant as bearing on the measure of duty, the opinion of an expert may be competent. *City of Washington*, 92 *U. S.*, 31.

Where witnesses for one side testify to a usage in *some* places and contracts only, and witnesses on the other deny its existence in other localities, there is no proof of its uniformity, but merely proof of a *local* or *partial* usage, which would be insufficient to vary the ordinary meaning of a term in a written contract. *Dickinson v. City of Poughkeepsie*, 75 *N. Y.*, 65.

S. P., applied to divided usage in one and the same place, *Pevey v. Schulenberg-Boeckeler Lumber Co.*, 33 *Minn.*, 45; s. c., 21 *Northwest. Rep.*, 844.

§ 731. *Single witness*.—Usage may be proved by one witness.

*Vail v. Rice*, 5 *N. Y.*, 155.

*Robinson v. United States*, 13 *Wall. (U. S.)*, 363; s. c., 20 *Law. ed.*, 653.

*Miller v. Insurance Co. of North America*, 1 *Abb. N. C.*, 470 (holding the testimony of the plaintiff alone, though contradicted by two disinterested witnesses, sufficient).

§ 732. *Single cases*.—Testimony to specific instances merely,<sup>1</sup> or to a habit of doing business in a loose way,<sup>2</sup> does not prove usage.

<sup>1</sup> *Stringfield v. Vivian*, 63 *Mich.*, 681; s. c., 6 *Western Rep.*, 631, 633.

<sup>2</sup> *Farmers and Mechanics' Bk. v. Erie R. Co.*, 72 *N. Y.*, 188, 195.

§ 733. *Foreign Law*.—Parol evidence is competent to show usage where it arises out of a foreign edict, as well as where it arises out of governmental instructions; and this whether the trade be allowed or prohibited by such edicts or instructions.

*Livingston v. Maryland Ins. Co.*, 7 *Cranch (U. S.)*, 506, 547; s. c., 3 *Law. ed.*, 421. [And see FOREIGN LAW.]

§ 734. *Presumption of knowledge*.—Parties are presumed to contract in reference to a uniform, continuous and well settled usage pertaining to the subjects of the agreement, if it be not opposed to well settled principles of law and not unreasonable.<sup>1</sup> But if the usage is of a particular trade or

locality, the presumption is not conclusive, and may be rebutted by proof of ignorance.

<sup>1</sup> *Walls v. Bailey*, 49 *N. Y.*, 464; s. c., 10 *Am. Rep.*, 407 (usage of plasterers in Buffalo to include door and window spaces in computation of area done).

*Mooney v. Howard Ins. Co.*, 138 *Mass.*, 375; s. c., 14 *Ins. L. J.*, 731 (holding that underwriter's knowledge of the usage of the business of one whose property they insured, might be inferred by the jury from evidence of the universality and long existence of the usage).

*Walls v. Bailey* (*above cited*).

§ 735. *Testimony as to knowledge*.—A party sought to be charged on the ground that a usage of trade was known to him, has a right to testify whether at the time of contracting he had such knowledge.

*Walls v. Bailey*, 49 *N. Y.*, 464; s. c., 10 *Am. Rep.*, 407. [And see KNOWLEDGE.]

*S. P., Johnson v. De Peyster*, 50 *N. Y.*, 666.

VAIN THING.—[See also EXPLAINING and EXCUSE.]

§ 735a. *The law does not require* one to do a vain or useless thing.

*Lawrence v. Miller*, 86 *N. Y.*, 131, 137 (formal tender dispensed with, the deed being present and ready for delivery, when the purchaser declared he was unable to make payment, and was told he could have no further time).

*Loomis v. Tift*, 16 *Barb. (N. Y.)*, 541, 544 (action against administrators before creditor's action to set aside fraudulent conveyance by decedent, not necessary where the estate was wholly insolvent and there were no assets. [The present rule as to such actions may be different. 22 *Abb. N. C.*, 329, 338, 341. See also *Adsit v. Sanford*, 23 *Hun (N. Y.)*, 45, 48, holding that execution is necessary to sustain a creditor's suit, although it would be useless; aff'd as *Adsit v. Butler*, 87 *N. Y.*, 585.]

*People v. Supervisors of Greene*, 12 *Barb. (N. Y.)*, 217, 222 (holding, on a motion for writ of mandamus, that it must be shown that party can perform the duty required). *S. P., 2 Johns. (N. Y.)*, 183; 3 *Id.*, 598 (*quo warranto*).

VALUE.—[For more familiar rules, see *Abb. Tr. Ev.*, 306, 356, 368, 369, 728. For kindred topics, see DAMAGES.]

§ 736. Comparison to lost article. § 739. Consideration in deed or bill  
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738. Offers and refusals. 740. Trade scale.

§ 741. Assessment.  
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§ 743. Foreign coin.

§ 736. *Comparison to lost article*.—To prove the value of a lost article it is competent to prove by one witness its resemblance in qualities affecting value, to another article, and to prove the value of the latter by another witness.

*Berney v. Dinsmore*, 141 *Mass.*, 42; *abst. s. c.*, 33 *Alb. L. J.*, 243. (No error to allow plaintiff, though not an expert, to pick out a pearl of the same size, color and appearance as the one lost; and to prove its value by an expert.)

*S. P., Home Ins. Co. v. Weide*, 11 *Wall. (U. S.)*, 438 (allowing value of stock of goods burned to be proved by evidence of value of similar stocks in same place, in proportion to annual sales).

§ 737. *Cost*.—In the absence of other evidence, cost is competent as tending to show value.

*Ellsworth v. Ætna Ins. Co.*, 106 *N. Y.*, 624.

*Ætna Insurance Co. v. Weide*, 9 *Wall. (U. S.)*, 677.

§ 738. *Offers and refusals*.—As tending to show value, evidence of an offer to buy or sell, or a refusal to do so, at a specified price, is competent against the party who made it.<sup>1</sup>

But it is in the discretion of the court to refuse to receive such evidence in favor of the party who made or refused the offer,<sup>2</sup> or evidence of what a third person, even though one under whom a party claims, offered or refused; because of the ease with which offers in bad faith might be made.<sup>3</sup>

<sup>1</sup> *Thurber v. Thompson*, 21 *Hun (N. Y.)*, 472 (company's refusal to sell, competent to negative imputation of fraudulent over-valuation by vendor to the company and its officers.)

*Dalrymple v. Hannum*, 54 *N. Y.*, 654 (evidence that plaintiff had offered to re-convey the property in question to defendant, for a trifling sum, and of defendant's refusal, competent against defendant, to reduce damages).

<sup>2</sup> *Boston Marine Ins. Co. v. Slocovitch*, 55 *N. Y. Super. Ct. (J. & S.)*, 452 (allowing such evidence as competent to negative existence of motive to destroy).

*Hotchkiss v. Germania Fire Ins. Co.*, 5 *Hun (N. Y.)*, 90 (to same effect).

<sup>3</sup> *Keller v. Paine*, 34 *Hun (N. Y.)*, 167 (holding it not error to exclude such evidence).

*Compare* *Harrison v. Glover*, 72 *N. Y.*, 451; rev'g 9 *Hun* (*N. Y.*), 196 (holding that the offer of third persons, of their own goods, made in good faith and the ordinary course of business, in a form inviting an immediate acceptance which would be binding in honor, would be competent for the purpose of proving their price, when their price was referred to in the contract between the parties in suit, as a standard for themselves).

Mere offer at auction, and no bid, not sufficient foundation for opinion on value of stock. *Hanna v. Sanford*, 20 *N. Y. Weekly Dig.*, 288.

§ 739. *Consideration in deed or bill of sale*, not competent.

*People ex rel. Mayor etc. of N. Y., v. McCarthy*, 102 *N. Y.*, 630; s. c., 6 *Eastern Rep.*, 557.

§ 740. *Trade scale*.—A scale of prices agreed upon by an association or combination in the business is not competent as original evidence of value, against third persons.

*De Witt v. De Witt*, 46 *Hun* (*N. Y.*), 258 (scale agreed on by nurses in a hospital, not competent to show value of nursing services).

§ 741. *Assessment*.—A tax valuation or assessment, not competent.

*Kenerson v. Henry*, 101 *Mass.*, 152.

[Compare APPRAISAL.]

§ 742. *Things in action*.—Obligations for the payment of money, in the absence of evidence to the contrary, are presumed worth their face.<sup>1</sup>

The rule that opinions of witnesses are competent on a question of value, does not apply to such obligations as commercial paper.<sup>2</sup> Otherwise of stocks such as are not dealt in but held as investments.<sup>3</sup>

<sup>1</sup>*Loomis v. Mowry*, 8 *Hun* (*N. Y.*), 311 (promissory note).

*Wintermute v. Cooke*, 7 *Hun* (*N. Y.*), 476 (corporate bonds : rev'd, in 73 *N. Y.*, 107, on other grounds).

*Smith v. Baker*, 42 *Hun* (*N. Y.*), 504, 506 (corporate stock : *dictum*).

*Potter v. Merchants' Bank*, 28 *N. Y.*, 641 (holding that the proper inquiry is as to the solvency of the obligor, and the validity of the instrument).

*Atkinson v. Rochester Printing Co.*, 43 *Hun* (*N. Y.*), 167.

<sup>3</sup> *Sistare v. Olcott*, 15 *N. Y. State Rep.*, 248.

Proof of sequestration of the corporate property, conclusive as to worthlessness of stock. *Tockerson v. Chapin*, 52 *N. Y. Super. Ct. (J. & S.)*, 16.

§ 743. *Foreign coin*.—The value of foreign coins, as ascertained by the estimate of the Director of the Mint, and proclaimed by the Secretary of the Treasury, is conclusive upon custom-house officers and importers.

*Hadden v. Merritt*, 115 *U. S.*, 25; 29 *Law. ed.*, 333; 5 *Supm. Ct. Rep.*, 1169 (holding that if there was error, application must be made to the department to correct it).

WAIVER.—[For kindred topics, see ACQUIESCENCE and RATIFICATION.]

§ 744. Oral evidence.

745. — notwithstanding stipulation requiring writing.

746. Direct testimony.

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§ 748. Neither consideration nor estoppel needed.

749. One objection not waived by another.

§ 744. *Oral evidence* is competent to show a waiver of strict performance, or acquiescence in non-performance, even when the obligation is such that oral evidence of a modification of it is not competent.

*Mead v. Parker*, 111 *N. Y.*, 259; s. c., 22 *Abb. N. C.*, 129 (guaranty under statute of frauds).

§ 745. — *notwithstanding stipulation requiring writing*.—A condition may be waived by parol, notwithstanding a provision in the instrument that nothing but a written agreement signed shall have that effect. The provision requiring a waiver to be in writing may itself be waived.

*Carroll v. Charter Oak Ins. Co.*, 1 *Abb. Ct. App. Dec. (N. Y.)*, 316; s. c., 10 *Abb. Pr. N. S. (N. Y.)*, 169; aff'g 40 *Barb. (N. Y.)*, 292.

*Pechner v. Phoenix Ins. Co.*, 65 *N. Y.*, 195; aff'g 6 *Lans. (N. Y.)*, 411.

*Goodwin v. Massachusetts Mut. Life Ins. Co.*, 73 *N. Y.*, 480, 495.

§ 746. *Direct testimony*.—A party may testify directly to the fact that there has been no conversation or understanding between him and another waiving a right on his part.



*Collins v. Manning*, 1 *N. Y. State Rep.*, 204 (reversing for error in excluding question. Opinion by DANIELS, J.).

§ 747. *Acts and declarations.*—When conduct is relied on as a waiver, the party has a right to show what was said and understood at the time of the transaction, to rebut the inference.

*Osborn v. Gantz*, 60 *N. Y.*, 540; aff'g 38 *N. Y. Super. Ct. (J. & S.)*, 148 (waiver of condition for cash payment upon sale).

*Whitehead v. N. Y. Life Ins. Co.*, 102 *N. Y.*, 143 (waiver of forfeiture).

§ 748. *Neither consideration nor estoppel needed.*—Waiver of a forfeiture need not be based on a new agreement, nor an estoppel.

*Titus v. Glen Falls Ins. Co.*, 81 *N. Y.*, 410; s. c., 8 *Abb. N. C.*, 315, 328. (So holding of insurance policies; and that mere negotiations, recognizing the existence of the contract, waive as matter of law the previous forfeiture.)

§ 749. *One objection not waived by another.*—It is no evidence of waiver of an objection taken by a party that he also asserts a second objection based upon a distinct ground.

*Blossom v. Lycoming Fire Ins. Co.*, 64 *N. Y.*, 162, 166.

WEALTH.—[See also *INSOLVENCY*.]

§ 750. *Specific property.*—To show wealth, when that fact is competent as affecting damages, one is not limited to general evidence, but may prove the value of specific property.

*Crosier v. Craig*, 47 *Hun (N. Y.)*, 83.

WEATHER.

§ 751. Signal service record.  
752. Comparison.

§ 753. — of season.

§ 751. *Signal service record.*—The record kept at an authorized United States signal service station, is competent evidence as a record of a public officer made in the course of duty, if it be properly made, identified and proved.<sup>1</sup>

<sup>1</sup>*Evanston v. Gunn*, 99 *U. S.*, 660; s. c., 25 *Law. ed.*, 306 (holding record kept at a place 10 miles away competent, with evidence tending to show the same weather at both places).

*Lindsay v. Cusimano*, 12 *Fed. Rep.*, 503 (holding record kept a mile distant, satisfactory).

In *Cameron v. Rich*, 5 *Rich L. (S. C.)*, 352; s. c., 57 *Am. Dec.*, 747, a log book kept by a mate, since deceased, was excluded, as not within the rule as to records kept in course of duty.

*Compare St. Louis v. Arnot*, 94 *Mo.*, 275; s. c., 13 *Western Rep.*, 200; 7 *Southwest. Rep.*, 15, (record kept by an university).

In *Evanston v. Gunn* the question how the record should be proved was expressly excluded from consideration.

By *N. Y. Code Civ. Pro.*, § 914, it is enough to produce the record certified by the officer in charge.

*Compare Schile v. Brokhahus*, 80 *N. Y.*, 614 (under a previous statute) and *People v. Dow (Mich., 1887)*, 7 *Western Rep.*, 897 (holding the record not competent).

§ 752. *Comparison*.—On the question whether it was cold enough to freeze an article, evidence as to the freezing of another article of the same kind is competent.<sup>1</sup> Evidence of the freezing of one of a different kind is not.<sup>2</sup>

<sup>1</sup> *Hodgkins v. Chappell*, 128 *Mass.*, 197.

<sup>2</sup> *Inglelew v. Northern R. R. Co.*, 73 *Mass. (7 Gray)*, 86. (On the question whether it was cold enough to freeze ink, evidence that it was not cold enough to freeze apples is irrelevant.)

§ 753. — *of seasons*.—A question how the weather compared with what was the usual weather of that season, improper as calling merely for opinion.

*Guiterman v. Liverpool etc. Steamship Co.*, 9 *Daly (N. Y.)*, 119; reversed on another point in 83 *N. Y.*, 358.

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§ 754. *Standards*.—To prove incorrectness of weight the standards of comparison used must be shown to have conformed to the statute.

*McGeorge v. Walker (Mich., 1887)*, 7 *Western Rep.*, 900, citing act of July, 1836, 5 *U. S. St. at L.*, 133.

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